IN THE

# Supreme Court of the United States

October Term, 1972

No. 71-1043

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

Supreme Court, U.S.
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SAUL HELLER

*Petitioner,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

On Writ of Certiorari to the Court of Appeals
of the State of New York

Motion of Charles H. Keating, Jr., for Leave to File a
Brief as Amicus Curiae in Support of Respondent
with Brief Annexed

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SAUL HELLER

*Petitioner,*

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THE PEOPLE OF THE STATE OF NEW YORK,

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On Writ of Certiorari to the Court of Appeals of the State of New York

Motion of Charles H. Keating, Jr., for Leave to File a Brief as Amicus Curiae in Support of Respondent

Charles H. Keating, Jr., (hereinafter referred to as Moving Party) respectfully moves, pursuant to Rule 42(3) of the Rules of the U.S. Supreme Court, for leave to file a brief as Amicus Curiae in support of the Respondent, The People of The State of New York.

Moving Party has a special interest in the subject matter of this appeal, having devoted considerable time, study and effort to assisting law enforcement in combating the spread of obscenity in the Nation: first, as the founder and co-counsel for Citizens for Decent Literature, Inc., and more

recently as a member of the Presidential Commission on on Obscenity and Pornography. Moving Party is also the appellee in an obscenity case pending before this Court, entitled, "*A Motion Picture Film Entitled 'Vixen', Russ Meyer, Eve Productions, Inc., Malibu, Inc., and Clarence P. Gall v. State of Ohio ex rel Charles H. Keating, Jr.*, October Term 1971, No. 71-599, as to which this Court on January 12, 1972, requested a response.[1] The latter appeal was carried over to the 1972 October Term without this Court having taken action thereon.

The grant of a writ of certiorari herein brings to this Court the first oral arguments involving the *review of a criminal conviction* for exhibiting an obscene motion picture film, since the grant of a writ of certiorari ten years ago in *Ohio v. Jacobellis.*[2] In Jacobellis, this Court reviewed the felony

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[1]In Moving Party's response thereto, see Motion to Affirm at pages 13-18, this Court was urged to grant plenary review in the "Vixen" appeal for several reasons: 1. The appeal involved a civil matter and was limited to the obscenity vel non issue; and 2. the record presented ideal "facts" for review, which included (a) one of the defendants was Producer Russ Meyer, the "King" (and very first) of the pandering motion picture producers; (b) the testimony of defense witness, film historian Arthur Knight, who candidly traced the erosion which has taken place since Russ Meyer started it all, and Russ Meyer's participation therein: and (c) the testimony of plaintiff's witness, Dr. Melvin Anchell, a practicing psychiatrist and author of "Sex and Sanity," who very logically explained the psychiatric basis for the proscription of obscenity (and this Court's holding in Roth-Alberts, 354 U.S. 476, 485, that it was the universal judgment of civilized nations that obscenity should be restrained).

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[2]Jurisdiction was first noted at the commencement of the 1962 October Term. *Jacobellis v. Ohio,* 371 U.S. 808, 9 L.Ed.2d 52, 83 S. Ct. 28 (Oct. 8, 1962). After argument without decision during that term, the case was restored to the docket. *Jacobellis v. Ohio,* 373 U.S. 901, 10 L.Ed.2d 197, 83 S. Ct. 1288 (Apr. 29, 1963). Reargument did not occur until late in the 1963 October Term (Apr. 1, 1964) with this Court's no-clear majority decision being handed

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conviction of Nico Jacobellis, manager of the Heights Art Theater in Cleveland Heights, Ohio, for exhibiting the French imported, so-called "art" film, "Les Amants" (The Lovers) and examined the interdependent "obscenity" and "scienter" issues, which in the following years have continued to plague this Court.[3] Here in the *Heller* case, the

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down on the last day of that term. *Jacobellis v. Ohio*, 378 U.S. 184, 12 L.Ed.2d 793, 84 S. Ct. 1672 (June 22, 1964).

The *Jacobellis* decision presents only the law of the case and is not a constitutional precedent which binds this Court. In that decision, Justices Warren, Clark and Harlan dissented and Justices Black and Douglas refused to sit in judgment on the merits and apply the law of the land in *Roth v. U.S.*, 354 U.S. 476, 77 S. Ct. 1314, 1 L.Ed.2d 1498 (June 24, 1957), which holds obscenity legislation constitutional. Of the four remaining Justices, Justice White's vote without opinion can, with reason, be attributed to the criminal aspects of the case and the unfortunate fact that Jacobellis, as an alien and convicted felon, would be subject to a denial of citizenship. Compare Justice White's dissenting vote on the same day in the *civil case, Grove Press, Inc. v. Gerstein* (Tropic of Cancer), 378 U.S. 577, 12 L.Ed.2d 1035, 84 S. Ct. 1909 (June 23, 1964). Justice Stewart erroneously applied a "hard-core pornography" reasoning which this Court, in reviewing a state obscenity conviction in *Misbkin v. New York*, 383, U.S. 502, 508, 16 L.Ed.2d 56, 61, 86 S. Ct. 958 (Mar. 21, 1966), held *not* to be the law.

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[3]See, for example, the compromising result reached in the *Redrup* and *Austin* cases, cert. granted, limited to the "scienter" issue in *Redrup v. New York*, 384 U.S. 916, 16 L.Ed.2d 438, 86 S. Ct. 1362 (Apr. 25, 1968), and *Austin v. Kentucky*, 384 U.S. 916, 16 L.Ed.2d 438, 86 S. Ct. 1362 (Apr. 25, 1966), but decided on other grounds in a no-clear majority decision in *Redrup v. New York*, 386 U.S. 767, 18 L.Ed.2d 515, 87 S. Ct. 1414 (May 8, 1967).

The *Redrup* decision presents only the law of the case, and is not a constitutional precedent which binds this Court. In that decision, Justices Harlan and Clark dissented. Of the seven remaining Justices, Justices Black and Douglas refused to sit in judgment on the merits and apply the law of the land in *Roth*, 354 U.S. 476, 1 L.Ed.2d 1949, 77 S. Ct. 1314 (June 24, 1957), which holds obscenity legislation constitutional. Of the five remaining Justices, Justice Stewart erroneously applied a "hard-core" pornography" reasoning which this Court, in reviewing a state obscenity conviction in *Misbkin v. New York*, 383 U.S. 502, 508, 16 L.Ed.2d 56, 61, 86 S. Ct. 958 (Mar. 21, 1966), held not to be the law in state cases.

obscenity issue is not so complex – only the obscenity vel non of the motion picture film "Blue Movie" is being litigated, and that in the context of "hard-core" materials[3a] and without reference to the "mens rea" aspect of the obscenity crime.

Of equal importance to the "obscenity vel non" question is the broad issue which underlies petitioner's second ground for review – the claim of a right in theater operators and others to an adversary hearing on the obscenity issue before a seizure of a motion picture film may be made, either as an incident to an arrest or under a search warrant. In Moving Party's view, this defensive claim of a so called "right to an adversary hearing" has no sound basis in legal logic,[4] having

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[3a]New York Penal Law Section 410.00(9), set forth herein at footnote 12, page 13 defines a "pornographic" motion picture as a motion picture showing "acts of sexual intercourse."

[4]As to the validity of Amicus' statement that there is "no sound basis in legal logic," see the shrewd observation of Justice Batjer, dissenting in *Glass v. Eighth Judicial District*, 486 P.2d 1180 (July 2, 1971) at 1189, regarding the anomalous result being reached:

> "In United States v. Wild, 422 F.2d 34 (2nd Cir. 1969), that court said: 'These cases (A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964), and Marcus v. Search Warrants, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961) ), are inapposite since they involved massive seizures of books under state statutes which authorized warrants for the seizure of obscene materials as a first step in civil proceedings seeking their destruction. The seizsures in this case were of instrumentalities and evidence of the crime for which appellants were indicted and lawfully arrested. We do not believe Marcus and A Quantity of Books can be read to proscribe the application of the ordinary methods of initiating criminal prosecution to obscenity cases.' Cf. Milky Way Productions, Inc. v. Leary, 305 F. Supp. 288 (S.D.N.Y. 1969), affirmed 397 U.S. 98, 90 S.Ct. 817, 25 L.Ed.2d 78 (1970), where it was held that an adversary hearing is not a prerequisite to the validity of an arrest for obscenity. *Here, on theory, Erwin, Glass could have been arrested without a prior adversary hearing, locked up, and prevented from exhibi-*

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literally emerged from out of nowhere. Encouraged by language of certain members of this Court, taken out of context from "prior restraint" cases, and nourished by this Court's silence on the matter when its voice was sorely needed that which began as a spurious claim has reached its zenith in its challenge herein to the power of the state judiciary to issue a search warrant upon an ex parte determination of "probable cause."[5]

The embroglio which has recently arisen between competing state and federal judiciary over the "adversary hearing" issue[6] has shepherded the entry of hard-core films into the

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*ting to the public his non-obscene materials, but following the majority opinion his two films 'Wanda,' the hypnotist, lashed into submission, for mature adults 'only,' and 'Title Withheld,' only for the mature adult who understands, must be granted an adversary hearing before they can be held. (Our emphasis.)*

[5]Since the judiciary have the power to authorize an arrest of the *personal liberty* of a person upon an ex parte showing of probable cause, what is the common sense justification for a differentiation in the case of a search warrant to seize a positive film print (even granting it may be the only print in existence) which is alleged to be the mere instrumentality of the crime? *Are the "suppression powers"* of government *any less where personal liberty is concerned?* Or for that matter, are the corrective powers of the judiciary, on balance, any less in the case of a motion to restore subject matter wrongfully taken under the search warrant.

[6]During the four years of silence since *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 20 L.Ed.2d 1313, 88 S.Ct. 2103 (June 17, 1968), brushfire wars have developed between the state and federal judiciary in practically every state in the Nation. Representative of this open warfare on this issue is the struggle taking place in the two pornography capitals of the U.S.A.

In the West, compare *California v. DeRenzy*, 275 Cal.App.2d 380, 79 Cal.Rptr. 777 (Aug. 1, 1969) and the California State rule, which permits a seizure under an *ex parte* search warrant where supported by affidavits which focus searchingly on the subject matter, with *Demich, Inc. v. Ferdon*, 426 F.2d 643 (9th Cir., May 13, 1970), and the Federal Rule (9th Cir.) which requires an adversary hearing before *any* search warrant seizure; vacated and remanded

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neighborhood theaters and drive-ins and presently acts as the guarantor for their remaining there. With local law enforcement neutralized by this issue, the subject matter regularly appearing on the public screens has hit the very lowest depths of depravity.

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for reconsideration in the light of *Perez v. Ledesma*, 401 U.S. 82, 27 L.Ed.2d 701, 91 S.Ct. 674 (Mar. 29, 1971).

In the East, compare *New York v. Heller*, 29 N. Y.2d 319, 327 N.Y.S.2d 628, 277 N.E.2d 651 (Dec. 1, 1971) and the New York State rule authorizing a seizure under an *ex parte* search warrant after a surreptitious viewing by a judge, certiorari granted by this Court in *Heller v. New York*, ___U.S.___, 32 L.Ed.2d 115, ___ S.Ct. ___ (May 15, 1972) with *Bethview Amusement Corp. v. Cahn*, 416 F.2d 410 (2d Cir. Oct. 6, 1969), requiring an adversary hearing before *any* seizure, certiorari denied 397 U.S. 920, 25 L.Ed.2d 101, 90 S.Ct. 929 (Feb. 24, 1970). Further, the result reached on appeal to the second circuit may very well depend upon the panel of judges hearing the case. Compare *Bethview, supra* (Hayes, Waterman, Bartels) which ordered the return of a film with *U.S. v. Wild*, 422 F.2d 34 (2nd Cir. Oct. 29, 1969) (Lumbard, Smith, Feinberg) which refused to disturb a conviction which was based upon evidence taken without an adversary hearing, rehearing denied 422 F.2d 38 (Feb. 2, 1970), cert. den. by this Court in 402 U.S. 986, 29 L.Ed.2d 152, 91 S.Ct. 1644 (May 17, 1971). For a variation of the rule in *Heller v. N.Y.*, which follows the Kentucky Court of Appeals decision in *Roaden v. Kentucky*, 473 SW2. 814 and authorizes an arrest without a warrant where hard-core films are concerned, see *New York v. Morgan*, 326 N.Y.S.2d 976 (Sept. 2, 1971); see also *New York v. O'Brien*, 320 N.Y.S.2d 425 (Apr. 7, 1971) where a trial court in Nassau County denied the district attorney's application for an adversary hearing prior to the issuance of a search warrant on the grounds that the New York law did not provide such a procedure. It would appear that in *Lido East Theatre Corp. v. Murphy*, 337 F.Supp. 1345 (Feb. 15, 1972) and the cases cited therein at footnote 8, the Federal District Court in the Southern District of New York has disregarded this Court's ruling in *Perez v. Ledesma*, 401 U.S. 82, 84 (Feb. 23, 1971) that:

> "The propriety of arrests and the admissibility of evidence in state criminal prosecutions are ordinarily matters to be resolved by state tribunals, see *Stefanelli v. Minard*, 342 U.S. 117 . . . ."

It is now a common thing for films such as "Animal Lover,"[7] "Deep Throat,"[8] "Sticky Situation,"[8] "School Girl,"[8]

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[7]A time-motion study of the film "Animal Lover" appears hereinafter at Appendix C, pages 1-22. The experience of Denver County (Colo.) District Attorney Seccombe with this film and the "prior restraint" issue is a classic example of the confusion and disability suffered by law enforcement from that conflict. See *Colorado ex rel McDevitt v. Harvey* 491 P.2 563 (Dec. 6, 1971) where the Colorado Supreme Court, in interpreting the decisions of this Court, came to an opposite conclusion from that of the New York Court of Appeals in *Heller* and held, at page 564, that "Under the criteria laid down by the United States Supreme Court in *A Quantity of Books v. Kansas*, supra, *which we are required to follow whether we agree with all facts of the case or not. . .*" (our emphasis), an adversary hearing was required before a film could be seized under a search warrant.

"Animal Lover" first appeared on the public screen in San Francisco and was immediately found to be obscene. (See *San Francisco Chronicle* news report of Jan. 16, 1971, a copy of which appears at Appendix J, Page 1.)

On July 18, 1972 the film was viewed by a Denver City police officer at the old Chelsea Theater, 1433 Tremont Place in Denver, who submitted an affidavit of what he saw on the public screen. On July 21, the affidavit was used as the basis for an ex parte order from Judge Manerbino allowing law enforcement to videotape the film. Thereafter, the videotape was exhibited to County Judge Weadick who set July 25th as a hearing date for the "adversary hearing." Following the "adversary hearing," Judge Manerbino issued the search warrant. When the police returned to execute the search warrant the film "Animal Lover" had left for parts unknown. (See Rocky Mountain news report of Aug. 27, 1972, a copy of which appears at Appendix J, page 2.) When the same procedure was followed as to other films in Sept. 1972, the film projection was stopped as the videotaping commenced, under the pretext that the film had broken, and thereafter a different film appeared on the screen. (See Denver Post of Sept. 26, 1972, copy of which appears at Appendix J, Page 3.) As a climax to this Keystone Cop scenario, in October of 1972 Denver District Court Judge Brooks, Jr. enjoined such evidence marshalling procedures, on the grounds that there was no legal basis for the videotape order. (See Boxoffice report of Oct. 16, 1972, a copy of which appears at Appendix J, page 4.) Compare the ruling of Denver Court Judge Brooks with that of Nassau County District Court Judge Donovan in *New York v. O'Brien*, supra at footnote 6, Amicus submits that this Court's rulings have law enforcement and the lower courts effectively chasing their tails.

and "Adultery For Fun And Profit"[8] to screen without opposition in local communities throughout this nation. Given this state of confusion, it is not unrealistic to regard that historical fact (i.e. that such films are currently screening

[8]Time-Motion studies of "Deep Throat", "Sticky Situation" and "School Girl" appear at Appendix D, pages 1-28, Appendix E pages 1-31, and Appendix G, pages 1-32. The appearance of these films in the Nation's capitol is commented on in the Amicus Curiae Brief of Charles H. Keating, Jr. in *Paris Adult Theater v. Slaton*, No. 71-1051 at page 84-86 on file in this Court. A time-motion study of "Adultery For Fun And Profit" appears at Appendix F, pages 1-26.

When "Deep Throat" and "Sticky Situation" appeared in New York City in Aug. of 1972, (See New York Times Movie Ad of Aug. 10, 1972 at Appendix J page 10 and 11), Judge Rosenberger viewed the same and, under the New York Court of Appeals decision in *Heller v. New York* 277 N.E2 651 (Dec. 1, 1971), issued search warrants under which both films were seized. Later, Judge Rosenberger countermanded his order upon the urging by defense counsel that, notwithstanding the State court *Heller* ruling, a prior adversary hearing was required by the federal decisions in the second circuit. Thereafter the public screening of "Deep Throat" resumed at the World Theater at 153 West 49th Street, which the Times notes is two doors east of a church, the Times Square chapel of the Salvation Army. (See New York Times report of Aug. 20, 1972, a copy of which appears at Appendix J, page 5.) As recent as Oct. 25, 1972, the recorded telephone ad for the World Theater (212-Ci-75747) announced "We continue our policy of bringing you first run, hard action, 35 mm features and 16 mm featurettes. We are presenting the World Premier of "Deep Throat," Screw Magazine has given "Deep Throat" 100% on the Peter Meter and it has been called the best porno film ever made. "Deep Throat" can be seen daily, starting at 10:00 A.M. . . (with the final performance starting at 11:50 P.M."

Amicus submits that there is no rational reason for not applying in such state cases the same standards governing "prior restraint" as were laid down in *U.S. v. Thirty-Seven (37) Photographs* 402, U.S. 363, 28 L.Ed.2, 822, 91 S.Ct. 1400 (Mar. 3, 1971) with respect to the federal jurisdiction and the federal laws restricting the importation of obscenity in the United States. With the state of confusion of the state and federal judiciary being what it is in the New York jurisdiction, it is time for this Court to reaffirm its statement in *Roth-Alberts*, 354 U.S. 476, 484, 1 L.Ed.2, 1498, 77 S.Ct. 1304 (June 24, 1957) that ". . . implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason *is*

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without opposition) as a major scandal of this Court's making.[9]

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*mirrored in the universal judgment that obscenity should be restrained. . .*" (our emphasis). Sounding as it does in bedrock truth, its positive affirmation that all civilized nations proscribe obscenity would do much to realign our judicial thinking and displace such false notions to the contrary.

[9]Certain members of this Court have, from time to time, spoken deridingly of the so-called "censors." See, for example, Justice Douglas' dissenting in *Ginsberg v. New York* 390 U.S. 629, 655, 20 L.Ed.2 195, 213, 88 S.Ct. 1274 (Apr. 22, 1968).

> "Censors are, of course, propelled by their own neuroses. That is why a universally accepted definition of obscenity is impossible. Any definition is indeed highly subjective, turning on the neurosis of the censor. *Those who have a deep-seated, subconscious conflict may well become either great crusaders against a particular kind of literature or avid customers of it.* That, of course, is the danger of letting any group of citizens be the judges of what other people, young or old, should read. (our emphasis)"

But doesn't Justice Douglas' sword have a double edge? Should not the above sentence more properly read "Those who have a deep-seated, subconscious conflict may well become either great crusaders against a particular kind of literature or avid customers *or defenders* of it." (our emphasis) In the light of this Court's treatment of nisi prius determinations during the past 10 years, isn't it entirely realistic to say that the real "censors" are those individual justices who have attempted to impress their minority views against the will of government and thereby supress the "voice" of the people "speaking" through their legislatures and the jury system? On this latter point, see Justice Learned Hand speaking in *U.S. v. Levine* 83 F.2 156, 157 (1936), a criminal prosecution for mailing obscene circulars, wherein he called the verdict on obscenity a small bit of legislation ad hoc, like the standard of care which the Court imposses upon a jury as a duty. See also Justice Hand's comment in Bill of Rights, Harvard University Press (1958) at p.72 and 73 wherein he viewed a court's usurpation of this inherent right of the people as an evil: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them which I assuredly do not. . ." On this matter, can Justice Stewart reconcile his opinion, published in *Volanski v. U.S.* 246 F.2 842, 845 (June 7, 1957), before he ascended to this Court, adopting Learned Hand's views, with his

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The Redrup "result" and the "prior adversary hearing" debates, both of which present issues herein, have been fused by defense attorneys into a modern defense mechanism which has completely decimated the people's defenses against lewd displays in public motion picture houses[10]. In its effort to bolster those defenses, and to halt the "spinning of wheels" which has occurred in the people's efforts to

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currently held, more personal views. In *Volanski* he described in detail the subject matter under review as:

> "Each set of the pictures in question consists of twelve photographs of a young woman in various poses and various stages of undress. In none of the frontal views is the subject totally unclothed below her waist. In some of the posterior views she is. The photographs are without even tenuous pretensions to artistic or scientific merit. They are unaccompanied by any text. Although some of the poses are rather bizarre, no subject is shown engaged in any indecent or immoral activity."

and, quoting at length from Justice Hand's opinion in *U.S. v. Levine* (supra), held "The question in our opinion is peculiarly one best left for *nisi prius* determination, preferably by a jury. . ." In *Jacobellis v. Ohio* 378 U.S. 184, 197, 12 L.Ed.2, 793, 804, 84 S.Ct. 1676 (June 22, 1964) he stated from this Court, in reversing the Ohio Judiciary: "I shall not today attempt further to define the kinds of material I understand to be embraced within that short hand description; and perhaps I could never succeed in intelligently doing so. But I know it when I see it and the motion picture involved in this case is not that."

[10]State prosecutors, out of sheer frustration, are refusing to pursue approved state judicial procedures, and are abandoning the enforcement of obscenity laws — laws which were duly enacted by the people's representatives, are clearly constitutional, and, considering the offerings on today's market, patently in point. Representative of this calamitous state of affairs is the situation presently existing in Rochester, New York. On March 18, 1972, Monroe County law enforcement commenced judicial proceedings under the *Heller* rule against the film "Adultery For Fun And Profit" exhibited at the Monroe Theater. (See time-motion study at Appendix F.) After a surreptitious viewing by City Court Judge Carl R. Scagchetti and Assistant District Attorney Howard R. Relin, the film was

marshal its evidence in obscenity litigation, New York law enforcement has retreated to what it regarded as a "safe" defensive position,[11] under which the state trial judges resort to dirty movie houses to review, in a surreptitious manner, the subject matter being displayed on the public screen, before issuing the search warrant which will bring the motion picture print into the court's custody for courtroom litigation. To make doubly certain of success in this "end around run" to the existing confusion, an arrest warrant is employed and law enforcement *also* proceeds under its historic authority to seize the instrumentality of the crime which is in the immediate area, incident to the arrest. *Chimel v. California*, 395 U.S. 752, 23 L.Ed.2, 685, 89 S.Ct. 2034 (June 23, 1969).

Moving Party submits that the super-cautious procedure resorted to herein, demeans the authority of the judiciary by

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seized (1) as an incident to the execution of an arrest warrant, and (2) under the authority of a search warrant, specifically naming the film. (See Rochester Democrat and Chronicle, dated March 18, 1972, a copy of which appears herein at Appendix J, page 6.) On July 7, 1972 Federal District Judge Harold P. Burke ordered the film returned. (See Rochester Democrat and Chronicle dated July 7, 1972, a copy of which appears herein at Appendix J, page 7.) In this frustrating situation, (see footnote 6) the Monroe County district attorney not only has refused to appeal the federal ruling, but has also refused to take any further steps against similar hard-core exhibitions being exhibited in that city as a steady bill of fare. The flood gates are open wide in that and most other New York cities. When "Adultery For Fun And Profit" was seized on March 18, 1972, the film "School Girl" (see time-motion study of "School Girl" at Appendix G) was publicly acknowledged to be playing in Rochester at the Riviera Theater. (See Appendix J, page 6, and the Rochester Democrat and Chronicle movie ad of March 18, 1972, a copy of which is attached at Appendix J, page 8.) On August 4, 1972, it was enjoying an unopposed, lengthy run at the Coronet Theater in Rochester. (See the Rochester Times-Union movie ad of August 4, 1972, a copy of which appears at Appendix J, page 9.)

[11] As the law functions today, there is no "safe" position. See footnote 6.

involving it in non-judicial functions, arrives at an extraordinary result which is without precedent in Anglo-Saxon law, and confuses the line of demarcation in the separation of powers which must exist between those who administer the law and those who interpret the law. If given recognition by this Court it will record as a judicial monument, a moment in our legal history which is better forgotten. Although respondent's brief has opted for an affirmance based solely upon the precautionary search warrant procedures resorted to by New York law enforcement, it is Moving Party's submission that the Court should employ a different approach and consider first, the arrest warrant procedure employed herein and the attending authority of law enforcement, at the time of the arrest, to seize a motion picture print used to project obscene pictures, as the instrumentality of the alleged crime.

Before this Court considers the search warrant procedures, it should first resolve the question as to whether a search warrant was necessary in the first instance. If no search warrant was necessary, the Court need never cross the *Heller* bridge. It seems clear from other decisions of the New York Court of Appeals that, given the opportunity, that Court would have written a different opinion, had the issue been presented and had they contemplated that other avenues were open to them under this Court's prior Rulings. See *New York v. Finkelstein*,[12] 218 N.Y.S.2d 341, 345, *New York v. Matherson*,[12] 16

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[12]In *New York v. Matherson*, 16 N.Y.2 509 (Apr. 22, 1965) the New York Court of Appeals held at page 511:

"Judgment affirmed. The seizure of evidence upon which the conviction is based was an incident to a lawful arrest on sufficient cause in a place open to public access. Therefore, the fact a search warrant was defective, as the People concede, because it was a general warrant (cf. *Marcus v. Search Warrant*, 367 U.S. 717; *Stanford v. Texas*, 379 U.S. 476) did not

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N.Y.2d 509, 511 (Apr. 22, 1965), *New York v. Peskin*, 16 N.Y.2d 511, 512 (Apr. 22, 1965). There is no reason for believing they would not follow the majority view in this area. See Amicus Brief at page 109.

This Court is sorely in need of a moral voice in the tradition of the late Associate Justice Noah H. Swayne of the United States Supreme Court:

> "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the

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preclude the reception in evidence of exhibits seized as an incident to the arrest.

Concur: Chief Judge Desmond and Judges Dye, Fuld, Van Voorhis, Burke, Scileppi and Bergan.

Not withstanding this Court's refusal, 10 years ago, to equate obscene materials with the pure food laws, gambling paraphernalia and other contraband, see *Marcus v. Kansas City Search Warrants* 367 U.S. 717, 6 L.Ed.2, 1127, 1135, 81 S.Ct. 1708 (June 19, 1961) a different case is presented where the New York legislature has specifically declared that the depiction of sexual intercourse on the motion picture screen *is* pornography and *is* contraband. (With certain exceptions not here applicable.) See New York Penal Law Section 410.00 (1) and (9) which provide for the forfeiture of motion picture prints used for "projecting . . . pornographic . . . motion pictures" and which specifically provides:

> "9. For the purposes of this section only, a pornographic still or motion picture, is defined as a still or motion picture showing acts of sexual intercourse or acts of sexual perversion. This section shall not be construed as applying to bona fide medical photographs or films . . ."

See also, Justice Bergan, author of the Heller opinion, speaking for the Supreme Court, Appellate Division, Third Dept. in *New York v. Finkelstein*, 218 N.Y.S. 2d 341 (Aug. 1, 1961) at 345:

> "One brief, for the first time, raised the issue of an illegal search and seizure of the book "Bloomer Boy," which was seized as an incident to the arrest of one of the defendants, and asks for a hearing before a decision. This application is not timely or properly made, would serve no purpose *since the seizure was of contraband incident to a lawful arrest, and is denied.*" (Our emphasis.)

voice of universal history. The theory of our Government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. . . ." Associate Justice Noah H. Swayne speaking in *Trist v. Child*, 21 Wallace 441 (1874).

or Justice Radcliffe of the Ohio Supreme Court:

"There is an oft-quoted cliche to the effect that it is not possible to legislate in the field of morals. The statement originally was and still should be 'it is not possible to legislate morality for the people.' We sorrowfully agree that this is so, but the impossibility of accomplishing that which is good for all the people should not and must not be used as an excuse for failing to try. History is replete with examples of nations that lost positions of eminence in the world and whose citizens lost their freedom due to decay of their moral fibre resulting in degeneracy and depravity. Legislative bodies must continue to pass laws which attempt to protect the morality of the people from themselves and from their own weaknesses. When such laws are rejected it should be by those governed, either by repudiating their legislators, by failing to reelect or by direct referendum. It is infelicitous for the judicial branch of the Government to seek for constitutional infirmities which enable courts to thwart the actions of that segment of government closest to the governed and directly responsive and responsible thereto. By its very nature, the judiciary is farthest from the people because of the length of tenure of mode of selection, consequently its authority must be exercised with deliberate caution. Lex citius tolerare vult privatum

damnum quam publicum malum (The law will rather permit a private loss or damage than a public evil)." Justice Radcliffe speaking for the Supreme Court of Ohio in *Ohio v. Jacobellis*, 173 Ohio St.22, 179 N.E.2d 777 (Jan. 17, 1962).

or the late Justice W. Turney Fox of the California District Court of Appeal:

"The effect of such 'literature' is to dull the moral sensitivity of many, if not most of the people who read it. It serves to erode our moral standards and tends to bring about the moral decay of our people. If the time ever comes when the average person, applying contemporary standards, does not look upon such a book as detrimental to the public welfare, it will be a signal that our society has deteriorated to a low level and that our civilization is in danger of collapsing as other civilizations have in the past which have over-indulged their appetities and cast aside decent standards of behavior." Justice Fox speaking for the District Court of Appeal in *People of the State of California v. Williamson*, 24 Cal. Rptr. 734 (Sept. 26, 1962).

or the late Associate Justice Michael A. Musmanno of the Pennsylvania Supreme Court:

"Prohibition against obscenity is not only a matter of cleanliness and godliness; the health of the community is involved. It has been established in thousands of cases that there can be a direct connection between abnormal sex books and sex crimes. Those who profess not to see this connection are either abysmally ignorant or refuse to accept the truth. . . .

"Why have there been laws against obscenity reaching back into the days of antiquity? It is because ob-

scenity, lewdness, lasciviousness strikes at the very moral fibre of the people and, when that disintegrates, a nation perishes. Justice Harlan said in the Roth-Alberts case . . . that 'the state can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards.' We know that Rome was great and went into decline; that Greece was the flower of culture, and that weeds finally grew in the Acropolis; that the Persian, Egyptian, Babylonian and numerous other civilizations were powerful, rich and indominable but something happened to them and they moldered into decay, not because of armed invasions from without their gates, but from moral deterioration within their own walls. . . ." Associate Justice Michael A. Musmanno dissenting in *Commonwealth of Pa. v. Dell Publications, Inc.*, 233, A2, 840, (June 29, 1967).

For lack of the same, we find the rankest order of obscenity inundating this Nation and reproducing itself out of the fission set into motion by this Court's obscenity decisions. The demoralizing force that obscenity exudes is everywhere. It fills our novels, paperbacks, still pictures, magazines and phonograph records, and has spilled over into and flooded our motion picture films, drama, radio, television, beer bars, nightclub acts, campus dialogue andcampus newspapers.

That films, such as are before this Court, should be countenanced by the judiciary of this "Judaeo-Christian" culture is autoptical evidence that we are presently pursuing the moral standards of biblical Sodom and Gomorrah. The sugges-

tion heard during oral arguments in *Paris Adult Theatre v. Slaton*, No. 71-1051, with the apparent acceptance of several members of this Court, that one approach would be to make such subject matter available to consenting adults, is but further proof along that line. Moving Party submits that by such responses, we continue to broadcast to the world our present worth, not as the free, moral people we have always prided ourselves as being, but rather as a nation of "slobs" which is about to succumb as the natural consequence of our own degeneracy.[13]

In Moving Party's view, this nation is facing a moral crisis. In granting review to eight obscenity cases, this Court has finally fixed the focus. Moving Party submits that the real import of these appeals[14] will be apparent only to

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[13] "In an ordered society of mankind there is no such thing as unrestricted liberty, either of nations or of individuals. Liberty itself is the product of restraints; it is inherently a composite of restraints; it dies when restraints are withdrawn. Freedom, I say, is not an absence of restraints; it is a composite of restraints. There is no liberty without order. There is no order without systemized restraint. Restraints are the substance without which liberty does not exist. They are the essence of liberty. The great problem of the democratic process is not to strip men of restraints merely because they are restraints. The great problem is to design a system of restraints which will nurture the maximum development of man's capabilities, not in a massive glob of faceless animations but as a perfect realization of each separate human mind, soul, and body; not in mute, motionless mediation but in flashing, thrashing activity." *—Hon. E. Barrett Prettyman, retired Chief Judge, U.S. Court of Appeals, in a speech at Law Day observances, 1962, at The Pentagon.* Reported in Case and Comment, March-April 1963.

[14] U.S. v. 12-200 foot reels of super 8 mm film, No. 70-2
U.S. v. Orito, No. 70-69.
Miller v. Calif. No. 70-73.
Heller v. New York, No. 71-1043.
Paris Adult Theatre v. Slaton, No. 71-1051.
Roaden v. Kentucky, No. 71-1134.
Alexander v. Virginia, No. 71-1315.
Kaplan v. California, No. 71-1422.

those members of this Court who are willing to recall to mind from memory the vastly superior state of public morality (sexual) which existed when *Jacobellis* was decided just one short dedade ago. It is an unfortunate fact that when one dwells for too long a period in a dung heap, the reminiscent smell of fresh air has a way of escaping his memory.[15] Without invoking that reference, the full significance of these appeals will be lost, together with the opportunity for "greatness" which such decisions offer this Court. It is not exaggeration to urge this Court that the results reached therein, and the rationale employed in arriving at those results, will either provide the foundation upon which our moral structures may be rebuilt, or will further excavate the grave of depravity into which this Nation is sure to tumble. The present fate of this Nation is in the hands of the individual members of this Court.[16]

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[15] See the observations of Federal District Judge Peirson Hall, speaking on "The Monster Vice" in *U. S. v. Four (4) Books*, 289 F.Supp. 972 at 973 (Sept. 10, 1968):

"'Vice is a monster of so vile a mien,
As, to be hated, needs but to be seen;
Yet seen too oft, familiar with her face,
We first endure, then pity, then embrace.[1]'"

"The verity of the above quotation is brought home not only by the continually increasing number of periodicals, paperbacks and other printed material glorifying things which most people regard as indecent or obscene, which flood news stands and book-racks, but also, to anyone who has read them, by the recent journeys of the Supreme Court of the United States on the question of 'obscenity' . . . ."

[1] From Alexander Pope's "Essay on Man."

[16] In the introduction of his book, "Jews, God and History," Max I. Dimont discusses the eight basic ways of viewing history, the last two of which he expresses as follows at page 20:

"The 'cult of personality' is the seventh face of history. Proponents of this school hold that events are motivated by the dynamic force of great men. If not for Washington, they say, there would have been no American Revolution; if not for Robespierre, there would have been no French Revolution; if not for Lenin, there would have been no Russian Revolu-

(This footnote is continued on the next page)

Moving Party therefore respectfully requests that he be granted leave to file a brief amicus curiae setting forth arguments on the jurisdictional questions posed herein and other related matters, for such assistance as they may provide to the individual justices sitting herein.

Dated: November 10, 1972.

Charles H. Keating, Jr.
*Amicus Curiae*

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tion. Men create the events, claim these historians, in contrast to the economic interpreters who insist on the exact opposite, that events create the men.

"The eighth face of history, the religious, is both the oldest and newest concept. The Bible is the best example of this type of historical writing in the past. This way of viewing history looks upon events as a struggle between good and evil, between morality and immorality. Most Jewish history, until recent times, has been written from this viewpoint . . . .

". . . Martin Buber holds that the central theme running through their history is the relation between the Jew and his God, Jehovah. In the Jewish religious view of history, God has given man freedom of action. Man, as conceived by the Jewish existentialists, has the power to turn to God or away from God. He can act either for God or against God. What happens between God and man is history. In the Jewish way way of looking at things, success in an undertaking, for instance, is not viewed as blessed by God. A man may arrive at power because he was unscrupulous, not because God aided him. This leaves God free to hold man accountable for his actions – both successes and failures."

This Nation, with its roots inextricably woven in our Judaeo-Christian background, is at a crossroads, and in danger of tobogganing toward destruction in the face of the warning words of Presiding Justice Turney Fox in *California v. Williamson*, 207 Cal. App. 2d, 838, 24 Cal. Rptr. 734 (Sept. 26, 1962) (Paperback book, Fear of Incest), cert. den. in *Williamson v. California*, 377 U.S. 994, 12 L.Ed.2d 1047, 84 S. Ct. 1902 (June 22, 1964) rehearing denied in 379 U.S. 871, 13 L.Ed.2d 77, 85 S. Ct. 13 (Oct. 12, 1964) that "other civilizations have in the past which have overindulged their appetites and cast aside decent standards of behavior." Moving Party submits that the judgment of the individual members of this Court will have its dynamic force in one direction or the other and that, in truth, men do create the events.

IN THE

# Supreme Court of the United States

October Term, 1972

**No. 71-1043**

SAUL HELLER

*Petitioner,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

On Writ of Certiorari to the Court of Appeals of the State of New York

Brief Amicus Curiae of Charles H. Keating, Jr., In Support of Respondent.

## STATEMENT OF THE CASE

### A. BACKGROUND.

On July 29, 1969, Deputy Inspector Charles Smyth, New York State Police Department, attended a performance at the Garrick Theatre in Manhattan with Inspector Rockwell and Lt. Sullivan of Manhattan South, where they viewed the motion picture film "Blue Movie" (18a, 19a). On the following day

Richard Beckler, Ass't. District Attorney of New York County viewed "Blue Movie" at the same theatre (13a). Acting upon an oral request by Ass't. District Attorney Richard Beckler, Judge Goldberg of the Criminal Court of the City of New York, also attended a performance at the Garrick Theatre on July 31, 1969 (12a). Deputy Inspector Smyth accompaning the Judge and purchased the tickets. About 100 other persons were in the theatre. (19a)

Judge Goldberg saw the entire movie, which ran from 3:40 P. M. until about 5:15 or 5:20 P. M. A few minutes later, at approximately 5:25 P. M., Judge Goldberg signed warrants of arrest. (10a) The arrest warrants were issued upon a sworn complaint affidavit signed by Inspector Smyth which was submitted to the Judge immediately after the movie. The arrest warrants which the Judge signed were formal bench warrants in which the Judge struck out the word "Clerk" and put his name thereon (11a). No discussions were had while the Judge was observing the picture (14a), except that at one point Judge Goldberg asked the Inspector, how much longer the film had to run. (15a) Smyth had accompanied Judge Goldberg to the movie at the request of the District Attorney. At the conclusion of the performance, Smyth asked the Judge if he felt the film was obscene (20a). Judge Goldberg signed the arrest warrants because in his opinion, the film was obscene under New York Penal Law Section 235.00 (10a).

Neither the Judge nor the Inspector recalled any signs restricting admission to adults (13a, 30a). No one at the theatre was notified or consulted prior to the issuance of the warrants (17a).

The three arrest warrants signed by Judge Goldberg were also search warrants giving the police officers the right to search for the film (21a). As soon as Judge Goldberg signed

the warrants, Smyth went back into the theatre and placed the manager, projectionist and ticket taker under arrest and seized the film (three reels) which was in the projection room (21a). At the time the film was taken he talked to the projectionist who was arrested (28a, 1a). The three reels were the only property taken at the time of the arrest (21a). At the time the three reels were taken into custody, one of the reels was still in the projector in the projection room and two were lying next to it.

A formal complaint (blue complaint) was drawn up that evening following the arrests (1a). Smyth had the reels vouchered in the precinct, received the voucher number there, then under the care of the precinct forwarded it to the property clerk's office where it remained until August 26, when Smyth picked the same up (28a). The three reels were in the possession of Smyth from August 26th until their introduction into evidence (28a). While in his possession, he stored them in his locker which was secured by his private lock (28a).

Defendants were arraigned on the charge on the same date, July 31, 1969. On August 19th, defendants appeared by attorney and pleaded not guilty and requested a 3-judge panel. At that time defendants waived the preliminary hearing and all motions (1a). The case was continued to Sept. 4th and to Sept. 16th when all three defendants appeared for trial. On that date, the charges against Susan Epstein, the ticket taker, and Art Kern, the projectionist, were dismissed on the grounds that the People would be unable to prove their guilty knowledge beyond a reasonable doubt (5a).

### A. The Trial.

The film, "Blue Movie," was exhibited to the court (35a, 37a). Time-motion studies of the subject matter appearing in

that film appear hereinafter at pages 26 to 60 for this Court's examination.

The People's proof at trial consisted of the testimony of Judge Goldberg who testified to the circumstances surrounding his viewing of the film and the issuing of the arrest warrants, and the testimony of Inspector Charles Smyth concerning the viewing of the film, the arrests and the seizure. There was a stipulation that the film which was viewed by the Court was the same one which Judge Goldberg saw on July 31, 1969 (18a). The defense offered 3 witnesses, Parker Tyler a 65-year old author of six books about motion pictures, Charles Winick a 47-year old professor of sociology at the City University of New York, and Thomas Phillips, a 27-year old writer for radio station WQXR. The defendant, Saul Heller, also testified.

**1. Plaintiff's Case in Chief.**

On direct examination by Richard Beckler, Ass't. District Attorney, of New York County, Judge Arthur H. Goldberg, Judge of the Criminal Court, City of New York, testified as to the circumstances surrounding his viewing of the film and issuing of the arrest and seizure warrants. He stated that on July 31, 1969, at approximately 3:40 P.M., he had occasion to view the film, "Blue Movie" in its entirety at the Garrick Theatre on Bleeker Street in Greenwich Village, New York. He stated that the film ran from 3:40 until about 5:15 or 5:20, after which, at about 5:25, he signed a warrant of arrest (10a). The arrest warrant was a John Doe warrant (10a). He stated that, in his opinion, the film was obscene under the definition of "obscene" in Section 235.00 of the New York Penal Law (10a). Immediately prior to the issuance of the arrest warrant, a sworn affidavit complaint was submitted to him by Inspector

# TIME-MOTION STUDY* OF MOTION PICTURE FILM "BLUE MOVIE"**

*A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner.

**(Exhibited at Garrick Theater, 152 Bleeker St., New York City, in the Greenwich Village Section, and held to be hard-core pornography by the New York Court of Appeals in *New York v. Heller*, 29 N.Y.2d 319, 327 N.Y.S.2d 628, 277 N.E.2d 651 (Dec. 1, 1971)).

"BLUE MOVIE"
(Part 1 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).




7 1:08
17 2:28
27 3:47
37 4:28
47 5:29
57 6:15
8 1:17
18 2:36
28 3:58
38 4:44
48 5:27
58 6:21
9 1:26
19 2:44
29 4:06
39 4:48
49 6:34
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10 1:34
20 2:53
30 4:11
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50 5:48
60 6:46

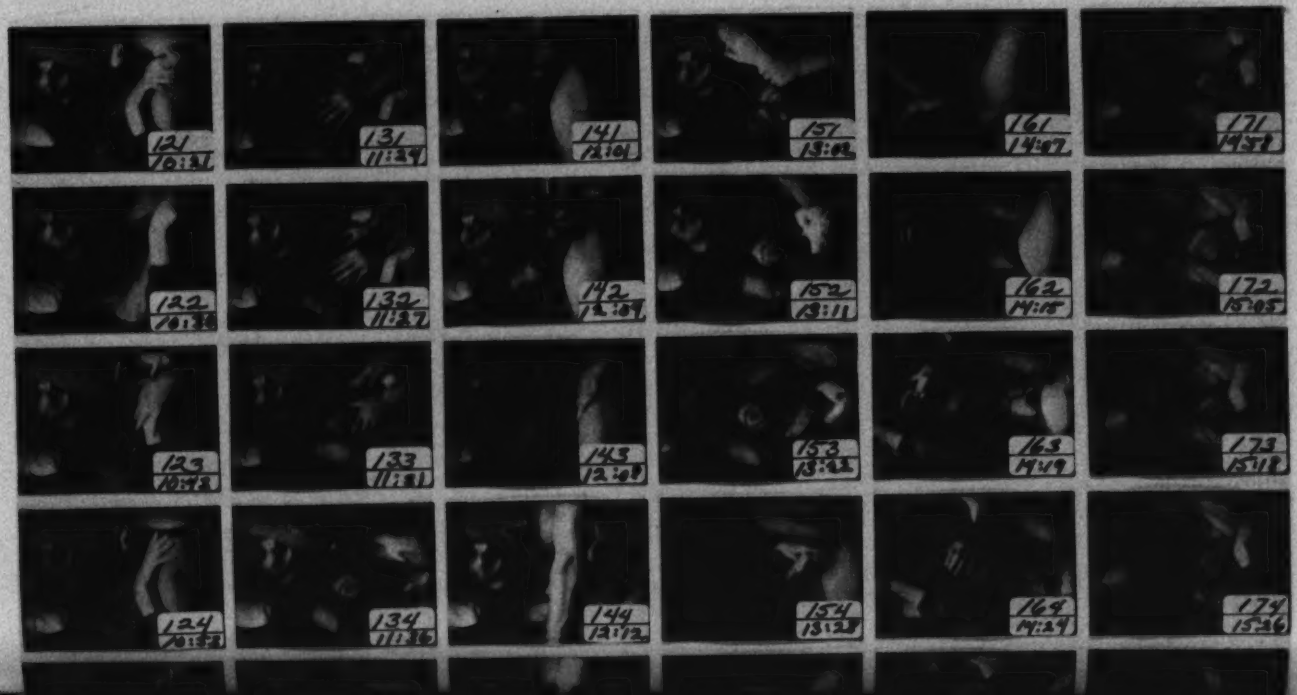
"BLUE MOVIE"
(Part 2 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).



"BLUE MOVIE"
(Part 3 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).




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11:47
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12:25
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**"BLUE MOVIE"**
(Part 4 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).




187 16:39
197 17:37
207 18:34
217 19:21
227 20:19
237 21:19
188 16:44
198 17:48
208 18:40
218 19:26
228 20:25
238 21:25
189 16:50
199 17:49
209 18:45
219 19:32
229 20:29
239 21:32
190 16:55
200 17:58
210 18:50
220 19:36
230 20:38
240 21:38

"BLUE MOVIE"
(Part 5 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).




247 22:27
257 23:26
267 24:44
277 25:14
287 26:05
297 27:03
248 22:32
258 23:31
268 24:37
278 25:17
288 26:11
298 27:06
249 22:40
259 23:48
269 24:58
279 25:20
289 26:19
299 27:09
250 22:49
260 23:58
270 24:59
280 25:24
290 26:29
300 27:18

"BLUE MOVIE"
(Part 6 of 18 Parts)

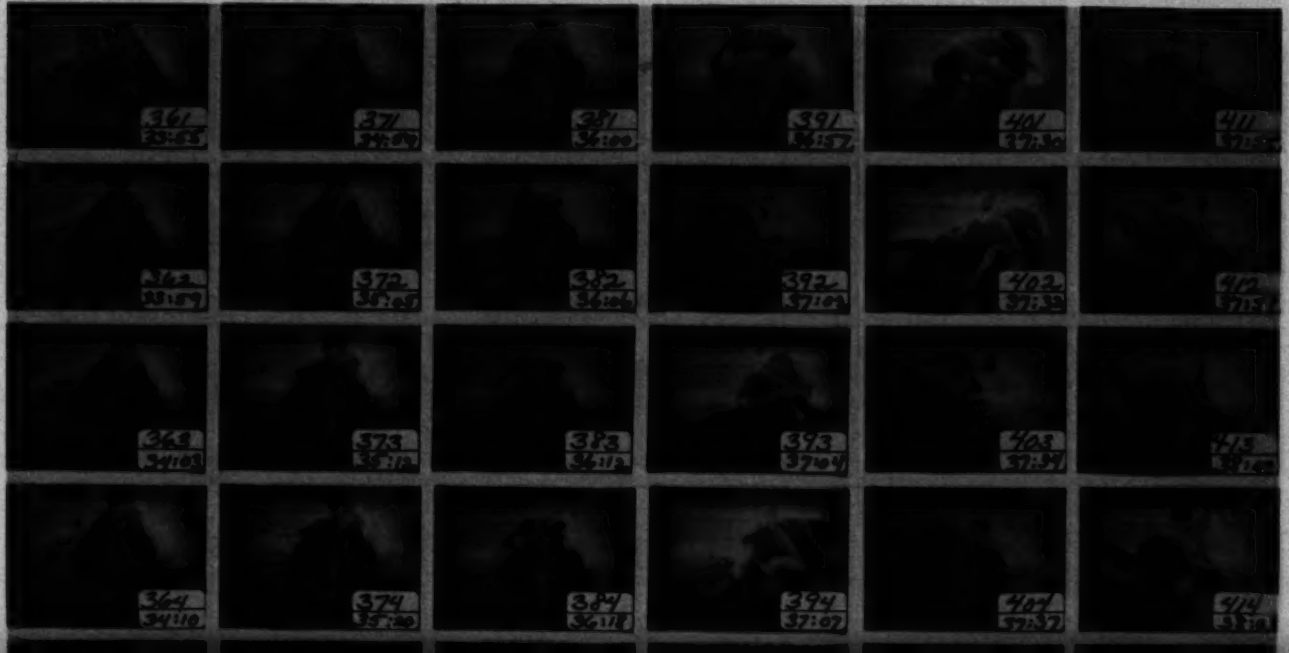
Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).




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"BLUE MOVIE"
(Part 7 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).




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"BLUE MOVIE"
(Part 8 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).



"BLUE MOVIE"
(Part 9 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).



"BLUE MOVIE"
(Part 10 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).




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"BLUE MOVIE"
(Part 11 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).



"BLUE MOVIE"
(Part 12 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).




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"BLUE MOVIE"
(Part 13 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).





"BLUE MOVIE"
(Part 14 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).





"BLUE MOVIE"
(Part 15 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).





"BLUE MOVIE"
(Part 16 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).





"BLUE MOVIE"
(Part 17 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).



"BLUE MOVIE"
(Part 18 of 18 Parts)

Held to be hard-core pornography in *People of the State of New York v. Heller*, 29 N.Y.2, 319, 277 NE2, 651 (Dec. 1, 1971) cert. granted in 32 L.Ed.2, 115 (May 15, 1972).



Smyth and based upon that affidavit he signed the arrest warrant. The arrest warrant was a formal bench warrant in which he struck out the word "clerk" and put his own name thereon (11a).

On cross-examination by defense counsel Joel H. Weinberg, Judge Goldberg stated that he had gone to the Garrick Theatre upon the oral request of Ass't. District Attorney Richard Beckler; that Beckler did not go to the theatre with the Judge and that Beckler had told him he had seen the movie on the day before (13a). He did not check the signs outside, but he did not recall any signs indicating an age at which a person had to be, to be admitted. He did not recall any titles on the film (13a), nor did he see any warning at the ticket booth as to the age that people had to be, when they entered the theatre, but that he wasn't looking for the same. He stated that Inspector Smyth paid the admission price and that he did not have any discussions with Inspector Smyth during the filming, except that at one point he did ask how much longer the film had to run. Asked whether the film was boring Judge Goldberg answered, "Well, I don't know whether that weighed very heavily with me. The answer is for the most part, yes." (15a)

The Court sustained objections to questions as to how many motion pictures the Judge had seen during the calendar year 1969, any special training he may have had in motion picture techniques, how conversant he was with the Redrup decision, the definition of obscenity as he understood it, the criteria by which he determined the film to be obscene, and the camera work in the picture which was offensive to him (15a-17a).

Charles Smyth, Deputy Inspector, assigned to the First Division, New York City Police Department testified on direct

examination as to the circumstances surrounding his viewing of the film and his execution of the arrest warrants and seizure of the film. He stated that during the month of July 1969, he had occasion to see the motion picture film, "Blue Movie," twice (19a). He first saw the movie on July 29, 1969, at the Garrick Theatre, 152 Bleeker St., New York City, in the Greenwich Village section, in company with Inspector Rockwell and Lt. Sullivan of the Manhattan South (19a). He saw that show at approximately 3:40 to 5:20 P.M. He next saw the movie two days later, on July 31, at approximately the same showing time, in company with Judge Goldberg. (19a) He stated that on each occasion there were approximately 100 people in the theatre and the seating capacity of the theatre was about 200 (19a). He stated that he accompanied Judge Goldberg to the movie on July 31 at the request of the District Attorney and that, at the conclusion of the performance, Judge Goldberg and he walked outside after which he asked the Judge if he felt it was obscene. He stated that the Judge then signed an arrest warrant(20a) which was also a search warrant giving law enforcement the right to search for the film (21a). At the conclusion of the signing he took the three arrest warrants, went back into the theatre and placed the manager, the projectionist and the ticket taker under arrest and seized the film which was in the projection room (21a). The only property which was taken from the theatre was the three reels of film (21a), one of which was still in the projector in the projection room. The other two reels were lying next to it (22a). He stated that he arrested the defendant, Mr. Heller, whom he knew to be the manager of the theatre "pursuant to these arrest warrants." (21a, 22a).

On examination by the Court, he stated that prior to the

issuance of the arrest warrants he had signed a complaint, which he swore to on the previous day, July 30, 1969, (23a), which was presented to Judge Goldberg with an application for search and arrest warrants (27a); that thereafter, Judge Goldberg signed the search and arrest warrants after which he arrested the three people and seized the film. He stated that a blue complaint was drawn up that evening after the arrest (26a). A copy of the latter complaint appears in the Appendix at page 1a and is reproduced hereinafter at Appendix J, page 12. He stated that Judge Goldberg signed the arrest warrants after Judge Goldberg had seen the picture and had been presented with the supporting complaint affidavit, which he, Smyth, prepared and had sworn to on the previous day (27a).

On further examination by the Asst. District Attorney, he stated that when he walked into the projection room one reel was in the projector and two reels were alongside (27a); that he talked to the projectionist whom he arrested (28a, 1a); that he took the three reels and had them sent to the property clerk's office; that he had them vouchered in the precinct, received the voucher number there, then under the care of the precinct forwarded it to the property clerk's office where it remained until August 26, when he picked them up from the property clerk's office (28a); that since that time the film has been in his possession in his locker which has a private lock, the combination of which only he knows; that he had the three films with him today which were stipulated into evidence as Peoples 1 in evidence on agreement of the Prosecutor and defense counsel (29a).

On cross-examination by defense counsel Joel Weinberg, Smyth stated that on both occasions he paid an admission fee and that at neither time did he recall seeing any sign in the

lobby with regard to age (29a-30a); that the application for the search and arrest warrants were signed in Judge Goldberg's presence on July 31, after viewing the film, and that the formal complaint in the matter was drawn subsequent to the arrest (30a); that he had seen the defense attorney at the Garrick Theatre at about 6:00 that evening, who originally stated that he was the manager; that upon being advised that he had a John Doe warrant, the defense attorney then stated he was only the lawyer and that Mr. Heller was the manager; that he did not recall seeing any sign above the ticket taker's booth indicating that one had to be over the age of 17 to get into the theatre. He stated that Mr. Heller arrived that night with the key to the manager's room which was examined with his permission (31a-32a).

An objection was sustained as to the question, "Are you aware of the dramatic change in social climate with regard to the depiction of sex on the screen?" (32a). He stated that he had no special training as a theatre critic nor did he have any journalistic background with regard to the theatre (34a). He stated that during the course of the movie, Judge Goldberg asked him if it was much longer (34a). Asked "Did you find the movie boring?", he answered, "Absolutely," and "I found the entire thing boring, repetitious, if you wish." (34a-35a). He stated that to the best of his recollection he did not recall seeing any Andy Warhol films before, but that he might have seen them and not known it. An objection was sustained as to the question, "Did this movie arouse you to go out and find a woman and go to bed with her?" (35a).

The three reels of film were exhibited to the Court (35a-37a). The Court made the following observations at the showing of the first reel: "For the record, what are these people

saying, none of the judges can hear? "Is there anything wrong with the machine, or is that the way it is going to be projected? Is that the way it is going to go?" (Film runs) Because we find it extremely difficult to understand most of the words being said. . . ." (36a). . . "All right, go ahead, sorry. (Film runs) The sound is much clearer now. (Film runs) At this point the sound is dead. (Film runs) Although we can observe the actors are talking to each other (Film runs). All right, we will take a recess." Upon the conclusion of the viewing of the three reels, the People rested their case.

The defense made its first motion since the charges were filed, which was a motion to dismiss on the ground that the People had not introduced any evidence on the elements which made up the obscenity test, (38a) and on the ground that there had been no prior adversary determination (39a) citing Lee Art Theatre v. Virginia, 392 U.S. 636 (June 17, 1968). The Court noted that defense counsel was not attacking the sufficiency of the warrant or the affidavit in support thereof, to which defense counsel noted, "I don't believe I have to attack the warrant." (49a) The Judge replied: "Well, that is a moot question now . . . the Presiding Judge also noted, "Well, I just want to say one thing. It seems to me, and I am not going to talk for both my colleagues, that if you are talking about the warrant and the seizure, your remedy would be motion to controvert the warrant...." to which Judge Tolleris agreed (51a). At the conclusion of argument, the defense motion to dismiss was denied. (52a).

### 2. The Defense.

Parker Tyler was offered by the defense as a witness to testify on "prurient appeal" and "social value." He stated that he resided at 15 Charles St., New York, N.Y., and that

he wrote books for a living (53a); that he wrote books about motion pictures and painting and that since 1944 he had written six: Namely, (1) The Hollywood Hallucination, (2) Magic and Myth of the Movies, (3) A Biographic Study of the Chaplin Myth, (4) Classics of the Foreign Film, (5) Three Phases of Film, and (6) Sex Psyche, etc. In the Film; that for the past four years he had attended the New York Film Festival where, in the special events program, there were lectures and programs in which he participated (55a); that he lectured at Columbia University, at the New School Social Research, at Cooper Union, at Trinity College in Hartford, and at Albright College, Pennsylvania (56a); that he was paid for these lectures but not in every case; that during the course of a year he would see about 100 motion picture films; that he had written articles for a number of academic magazines, such as the Kenyon Review, which used to be published by Kenyon College; the American Quarterly, published by the University of Pennsylvania, and by the New Republic and the Nation (56a-57a); that all of these articles dealt with films (57a); that he was not being paid for his testimony and that he had seen the defense attorney today for the first time (57a).

He stated that he had seen Andy Warhol's "Blue Movie" at a private screening about a year ago and that he devoted a chapter in his latest book, "Sex Psyche, etc. in the Films" to Andy Warhol's "Blue Movie" (57a). Judge Moldow made the following comment: "Before we get into that counsel, I will tell you something that disturbs me. We viewed a film, during the course of today, that was very badly edited in many spots, and I don't think you have to be an expert to see that. This witness has been asked questions about a movie that he saw about a year ago. Aside from the fact that you have identified

it by the title, what kind of assurance of any kind do we have that the contents approximated what we saw today? Do you intend to establish that in any manner?" The defense counsel made the following reply: "I can't. I think it is almost impossible for me to. . . ." The Presiding Judge made the following comment: "That is a problem in these cases that my colleague indicated a little earlier with the affidavit situation. The judge relies on an affidavit, he doesn't know whether that same movie is going to be seized according to the terms of his warrant. Now you are in a similar posture, offering evidence. All we know is he saw something called 'Blue Movie,' and to identify it foot by foot with what we saw today is, I appreciate, an overpowering task, isn't it?" The defense counsel replied: "I think it is, but I think, your Honor, if we take the position that we have never refuted the contents of the film that you saw here today, particularly the one-act, and this witness is not going to refute that, I don't think there is any unconventional sex in the film, and I don't think there is any problem in dealing with this witness' having seen the film that your Honor saw this morning. . . ." (57a, 58a).

Asked if he saw any social value in the film, he replied, "Yes, I saw a particular social value. I think it represents what might be called the attitude of the cool world toward sex." (59a); He stated that by that term he meant the attitude that has grown up in modern times, along sophisticated lines, among youth groups. It is an attitude of detachment, of indifference to the emotions, of taking everything in a perfectly cool way. I think that is the way sex is taken in the film in question. Sex is not represented as anything very exciting or extraordinary. It is an ordinary common event, and it

is mixed in with conversation, gossip, it is no more than a diversion, a distraction." (60a)

Asked concerning the technique employed in the film, he replied, "It is always like unedited footage, strung together, rather informally, and independent in the subject matter, but not in camera technique to aesthetic values." Asked to explain what he meant by camera technique and aesthetic values, he said, "When a film is made to be interesting, all kinds of shots, closeup, and medium shots, and so on, for variety's sake, different angles of the same action, but Warhol's camera is nearly always staring deliberately passive, doesn't try to articulate anything on its own, the actors articulate everything." (60a)

He stated that the film was not sexually stimulating, was not lewd according to his notion, and was not lascivious or salacious. (61a)

On examination by the Court, he was asked whether he had seen films of that nature, to which he replied, "Yes, not any blue movies, not the films that are manufactured purely for pornographic viewers. . ." Asked what he meant by the expression "blue movies," he answered, "A film made . . . for stag purposes" (61a). He stated that the term "blue movie" had a special meaning in the motion picture industry and that Warhol's film was advertised that way in the newspapers at times and the Village Voice, but that was not the original title which was "FUCK" (62a). Asked his age, he stated, "65."

On cross-examination by District Attorney Beckler, he was asked to give his formal education. He stated that he left Chicago Latin College in his sophomore year to write; that Chicago Latin College is a college preparatory school

and that his formal schooling ended at age 16. (63a) He stated that he had not taken any courses in film making or film editing or film photography or film criticism.

Asked whether "this cool world attitude toward sex" is portrayed through conversation or acts, he replied, "Through the acts, it all meshed as though it were quite an ordinary occasion, not a special occasion when the emotions are raised to a high pitch of sexual feeling." He stated that he regarded the conversation in the film as irrelevant and incidental, and the theme of the movie to be essentially what you see, not what you hear (65a). He stated that he had seen about 8 or 10 of Andy Warhol's movies and that there was no story line to "Blue Movie" (65a). He stated that when he saw the movie, he had difficulty hearing the sound which was a little low (66a). Asked for the point of distinction between the films on 42nd Street which he regarded as lewd, and "Blue Movie" which he regarded as not being lewd, he replied, as to the former, "Well, everybody leers, there are all kinds of exhibitions of anatomical parts, it is kind of a flirtation, all seems very naughty and lascivious. . ." Asked by the Presiding Judge, "The picture that merely titilates is lewd, but a picture that actually shows copulation is not lewd, is that your definition, sir?" The witness answered, "That's right." After agreeing that two-thirds of the film was devoted to the couple in bed, and one-third to the same two parties nude in the bath tub together, witness was asked by Judge Moldow, "Isn't that substantially similar to the method in which the sexploitation films that you refer to as lewd, proceed, where almost all the time that the spectator views the scene, he is seeing some of sex conduct?" The witness replied, "They are parallel but not alike at all be-

cause they are done in an entirely different spirit, and also they are absurd concoctions of plot which is exploitational, whereas the method here is to be very natural, very ordinary, matter of fact." (70a)

Asked by the Court who the publisher of his latest book was and how long it was, he replied, "Horizon Press, and 250 pages" and stated that 8 pages of that was devoted to "Blue Movie." A copy of the book was admitted into evidence as Defendant's Exhibit A without objection.

Asked by the Presiding Judge, "You say you found the picture had a social value, social redeeming value. For what reason, sir?" The witness replied, "Because it represents an attitude of modern youth toward sex, and I think that is very vital." He stated that he would label that as the theme of the picture, the underlying theme – the "cool" modern attitude of the modern generation toward the sex act. (72a)

Charles Winick was offered by the defense as a witness to testify on "prurient appeal" and "social value." He stated that he resided at 160 Riverside Drive, New York, N.Y., and was a professor of sociology at City University of New York (73a); that he spent a good part of the last 20 years studying the effects of mass media, especially on young people; that he spent two years preparing a report for the Joint Commission of Mental Health of Children, a Congressionally funded agency, on the effects of mass media on the behavior and health of young people; that from 1961 to 1967, he was Chief Consultant at NBC television network on the permissibility of material to be shown on the television network; that in 1957 he began a 2-year study supported by the Ford Foundation on censorship which resulted in a book published in 1959 called "A Taste and the Censor"; that in 1964 he received the

George Foster Peabody Award for distinguished achievement and meritorious public service in television, for a book which he wrote on the effects of television on young people called, "For the Young Viewer"; that from 1959 thru 1961 he was the Director of Basic Research for the J. Walter Thompson Advertising Agency, developing a program of research on the effects of mass communication; that he had published about 250 articles in professional journals, and ten books concerned with mass media; that his last book was called, "The New People" published in April, 1968, which was particularly concerned with the changing attitudes toward sex in the United States; that the longest chapter in that book deals with the presentation of sex in movies; that he has at various times been a consultant to the United States Subcommittee on Juvenile Delinquency in its investigation of pornography and has been consultant to the New York State Assembly and various other legislative groups (75a); that he taught those subjects for about 20 years at the University of Rochester, M.I.T., Columbia, and the City University and had directed about 400 studies on the effects of mass media on young people; that his articles have appeared in professional journals, such as "Social Problems" published quarterly, and in film publications, such as "Films and Filming"; that his doctorate is in sociology which he received at New York University in 1950 and that he is a fellow of the American Sociological Association and a licensed psychologist in New York State (76a); He stated that he had been asked by the United States Attorney to testify for the Government in the "I Am Curious (Yellow)" case but had, instead, testified for the importer (76a). The Court sustained an objection to the question, "Are you aware of the dramatic change in conventional and unconventional sex as depicted upon the screen?" (77a)

He stated that he had seen Andy Warhol's "Blue Movie" "last Thursday evening" at the request of the defense attorney. Asked if he saw any social value in that film, he stated, "Very much so." He stated that the film presents a growing and important point of view about sexual behavior by a director who represents increasingly the views of a great many people, a film which enables people to explore their own attitudes in a constructive way, and represents an important statement about private life, and personal behavior, by a film director who many people are coming to regard as someone who speaks for them. He stated that he thought more and more people are looking to films for this sort of re-enforcing of their views and attitudes which they previously got from novels, and other printed material. He thought that it had a great amount of clinical interest in the presentation of two different character types, a non-responsive woman, who is quite a celebrity in her own way, and an aggressive fellow; that there is a great deal of clinical interest in the very realistic presentation of their sexual behavior, without any attempt to make it stylized or to build in artificial values, or to make it hokey and to titilate the viewers." Asked if he found the film sexually stimulating, he stated, "Exactly the opposite." He stated that the film was not aphrodisiac and that it would dull a sexual interest because it makes the sexual behavior of the couple routinized and not following the typical kind of crescendo approach of many movies with overpowering music building up to a climax, with a shot of waves breaking on the shore and that sort of thing . . . .; that the tawdriness of the surroundings, the lack of carefully selected costumes, the flatness of the image on the screen, the nonuse of the usual long shot, medium closeup of the movies, the lack of the makeup so that you can see even pimples on the

back of the girl, and so forth, make sex a less mysterious and provocative act, and a kind of mundane, casual activity. He stated that the fact that it takes so long, also serves to, make it anti-sexual to most people . . . . (79a).

Asked by the presiding judge whether he did not find the sex act was performed most explicitly in the picture, he stated that he thought there was a certain amount of ambiguity about what was happening because there was no closeup. To this, the presiding judge replied, "That is, you didn't actually see the male organ penetrate the vagina." Whereupon the witness stated, "Yes, that's right. I think, if I may be permitted, there was a certain amount of ambiguity about what had occurred. . . ." The judge then asked what impression he got as to what occurred, to which witness stated, "Well, I would say that it is likely that in fact they had engaged in sexual intercourse, but I would say that I couldn't be sure of it." He stated that he would say that the intention of the film was to convey the impression that sexual intercourse had been engaged in (80a). Asked by defense counsel Weinberg whether he found the film lewd, salacious, or containing any forms of unconventional activity, he stated, "No." (80a)

On cross-examination by Ass't. District Attorney Beckler, he stated that he had seen Andy Warhol's film, "The Chelsea Girl" most recently; that he had seen sexational movies on 42nd Street, maybe two or three a year, in the line of duty (82a). Asked to differentiate between the two, he stated that the sexsational movies tried to present sexual behavior in a titiliating manner, surrounding the activities with as many provocative situations, such as sounds and music, and the removal of clothing, and so forth; that they were not trying to make a statement about the situation of contemporary men and

women in this country today; that they don't have political discussions on the role of the police in modern society and discussions on Frank Klein as a modern artist; that the director of the "Blue Movie" was trying to bring to these modern arts, Vietnam, the role of the police, and so forth, to indicate the relationship between sexual behavior and the larger political attitudes; that the 42nd Street movies in no way try to bring in such larger social considerations, or bring in political attitudes, and that they surround sexual behavior with a lot of hocus pocus and costuming and so forth and that "Blue Movie" was totally different from the exploitation movies (82a). Asked by Judge Muldow whether the title, "Blue Movie" had a connotation to him in the film industry, he replied that he interpreted the title as the artist's semi-jocular of what he is doing; that he used the title "Blue Movie" as a kind of satiric way to indicate that society and many people might think what he is expressing in "Blue Movie" (but the viewers wouldn't think) was blue (83a).

Asked by the District Attorney whether it would be fair to say that it is his opinion that the theme of this movie is the portrayal of the sex act without the great highs and lows that could be a natural, real, not at times a very elevating or very depressing state, he indicated, "I think that would be a fair statement" (85a). He stated that it would not be a fair statement to say that it really doesn't make any difference what they were talking about while they were doing the act (85a). He stated that it was his opinion that this performance was realism (87a); he stated that there was ambiguity in the film not as to what they were doing, but as to the relationship between the film maker and the fact that there was a film being photographed, as in the "I Am Curious (Yellow)" case.

Asked whether realism as opposed to the trumpet sounding and music would in most cases never titiliate the public to the degree that a movie with such things as that would, he replied that he would say so for the same reason that we know that the nude figure is far less likely to titiliate most people than the partially clothed figure (89a).

He stated that he could see showing this movie to a class at medical school or a group of residents in psychiatry, presenting these two characters as types, the female, the distant aloof and non-responsive woman, and the energy-getting, sexually aggressive male trying to achieve his goal while the woman is not really cooperating with him in this (91a). On questioning by Judge Moldow, he stated that he would not present it to a college group unless it were a highly specialized class in psycho-pathology or something like that. Asked by Judge Moldow, "You wouldn't present it to the general population between the ages of 18 and 22," the witness answered, "Well that would depend. I think that I would in general, I would have confidence that the nature of the film is such that there would not be. . . ." (91a). He stated thereafter he would not present it to an undifferentiated group. He thereafter changed his answer to, "I would say so." Asked by Judge Moldow if he had reservations he stated, "I hesitated for a moment, but, on balance I would say so." Asked by the presiding judge, "For what purpose would you present it to such an undifferentiated group? . . . For clinical observation or study or general entertainment?" the witness answered, "Well, I don't know that I would accept those two categories." Pressed by the Presiding Judge further, he stated, "Well, I have already said for clinical observation. It certainly has a value, and I would state that as an example of an

important kind of theatrical film and I would say an entertain ment film."

Asked by the Presiding Judge concerning his statemen that the woman was not cooperative in the picture, he admitte that she did engage in what appeared to be sexual intercourse she did gyrate her buttocks as if engaged in the act, she di kiss and embrace him, she did fondle the parts of his body she did soak his penis in the shower, and raised it from placid state to at least a semi-erect state, but he qualifie those admissions with the statement, "All of those things ar true but there was a kind of distance and lack of involvemen in its." (93a)

Asked whether or not he had any trouble understandin what was being said in the movie, he first stated, "I don' think so." He later admitted, "I am sure there was a few bit that I didn't, I couldn't understand," but attributed that to th particular print that he was viewing (95a). He stated "Blu Movie" was not a film with a beginning, middle, and end plot that it begins abruptly and ends abruptly. He stated that h didn't believe that Mr. Warhol made films with messages Asked if he came away with a theme, he stated, "A theme yes, but a theme is not a message, and to paraphrase what the theme of the film means in a couple of sentences is like saying Gone With the Wind is a story about a woman whose plantation burns down and finally gets the plantation back.' (97a)

Asked by the Presiding Judge what he meant by lewd, he stated "The presentation of substantive material which pre sents sexual content in an offensive or pathological or titili ating manner." He further stated that the film was not lewd because it was a realistic presentation of an act of coitus

which did not seek to present that act in an offensive or pathological or titiliating manner (99a). Asked by the Presiding Judge, "What is the distinction characteristic of this film that leads you to conclude that the realistic presentation of an act of intercourse does not titiliate?" . . . the witness replied, "As presented in this film, it does not titiliate." Asked how old he was and why it didn't titiliate, he stated he was 47 years old and that from his interviews of over 20,000 people in the past 12 years he thought he had an impression of how different age groups responded (100a).

Before recessing for the day, defense counsel Weinberg asked the Court whether it would be necessary to testify in the record that the film seen by Dr. Winick was the identical subject matter as viewed by the Court, the District Attorney refused to join in a stipulation on that matter, saying, "I think it goes to the weight whether or not it is the same. . ." (103a)

On Sept. 17, 1967, the trial resumed with Thomas Phillips testifying as a witness for the defendant on "social value" and "prurient appeal." Phillips stated that he worked for the New York Times writing radio newscasts for Station WQXR; that he had done so for slightly over four years; that in addition he was a freelance writer and wrote articles for newspaper publications such as the Times, the Time Magazine, the Village Voice, Rolling Stone, Pop and New York Scenes Magazine about the arts, film, theatre, popular music and books; that he recently wrote an article on "Blue Movie" for the Village Voice; that he was 27 years old, married, and the father of two children; that he had first talked to the defense attorney this last weekend and had seen Andy Warhol's "Blue Movie" prior to having talked to the defense attorney (105a).

He stated that he saw "Blue Movie" at the Garrick T approximately two months ago and as a result of seein movie wrote the article; He stated that in his opinio film had social value; that the basic theme of the movi about the political and social situation in this country (106a).

Asked by the Presiding Judge what he meant by th stated, "I think I know that the characters in the movie a great deal of time talking about subjects such as taxe war, presidential election, police. I think that their conc was very clear, that they felt along with many other pe this country, that they had been somehow cheated, tha votes and their taxes, had not only been wasted, but had ally been turned against them, and in connection with feel that the movie offered not only an outline of their cal and social dilemma, but also a solution of sorts." Asked by Judge Tolleris, "What solution would you s the witness stated that "in the face of political powe ness, in the face of evil over which there is seeming control, the thing to do is to stay home, refuse to conten the situation, and find what happiness you can in privat sonal relationships." (107a) He stated that he did no the film to be lewd or salacious.

On cross-examination by the District Attorney, he that he had seen five, six or seven of Andy Warhol's m and that he had seen a couple of the sex-type movies on Street quite a while ago. He stated that he could not a hear the conversation but attributed that to what is "natural sound" (108a); He stated that the sound in the ual interc urse scene in the beginning was far off and th couldn't pick up all of it. Asked by the District Attorn

be a little more specific as to how he arrived at the conclusion that a solution was offered by the movie, he answered, "Well, the whole movie is about that." The following colloquy took place between the witness and the Presiding Judge:

Presiding Judge: "Just a minute, you said the whole movie is about that, and I said, about what?"

Witness: Okay, okay. What is the movie? The movie is day spent, more or less a day spent, between two people."

Presiding Judge: "Engaging in sexual intercourse?"

Witness: "Engaging in sexual intercourse, and a great deal more than that, engaging in a great deal of conversation."

Presiding Judge: "A great deal of conversation?"

Witness: "I would say a great deal of conversation."

Presiding Judge: "Well, now how much time did the whole film take?"

Witness: "I believe it took an hour and 45 minutes, is that correct?"

Presiding Judge: "And how much of that time was spent in conversation?"

Witness: "I did not time it, but I would say the bulk of it."

Presiding Judge: "The bulk of it?"

Witness: "More than half of it."

Presiding Judge: "The bulk took place about what?"

Witness: "About Viet Nam, taxes, and . . . ."

He thereafter stated that about one-half hour was devoted to conversation about the political and social situation which occurred in the relaxed reel, following the intercourse scene; that is, the reel between the bed and the bathtub, was the political conversation. Judge Moldow thereafter stated, "In other words, it was confined to the second reel which was

possibly one-third of the movie. During that second re
isn't it true that the parties were nude the entire period
time?" to which the witness replied, "That is true, bu
didn't think that was particularly important." (114a) He stat
that "there was an organic connection between the sexual
tercourse scene and the political scene. To express it ve
succinctly, . . . the sexual intercourse was an emblem of t
alternative to struggling against corruption, and disorder
society." (115a)

He stated that the movie was not lewd to him because
did not present sexuality in a narrow impersonal way. Aske
what he would consider lewd, the witness stated he wou
"consider a movie lewd in which there was attempt made
to characterizations or any attempt beyond pure simple straig
depiction or straight sex where there was no kind of huma
involved at all, no kind of human relationship between th
audience and the people on the screen." (117a) Asked
Judge Moldow if there were such an involvement and such
relationship did exist, would it matter in what manner the s
was portrayed, the explicitness, whether you used telepho
lens when you showed genital parts, etc. . . . The witne
stated, "I couldn't actually say because we are just dealin
with this movie." (118a) Asked to restate the dominant them
he said he thought "the dominant theme had to do with th
political and social situation in this country today, and
possible solution to the political dilemma of people findi
themselves in a feeling of powerlessness to deal with instit
tions they feel are evil." (118a) Asked by Judge Toller
whether the sexual part of the film was necessary, he replie
"I think it is an organic connection to the political and soci
contents of the film, and in a sense . . . an emblem of th

alternative to struggling with evil and corruption (119a)."; to which the Presiding Judge commented, "You mean if you can't fight evil and corruption, let's indulge in sex, is that it?" Asked by the Presiding Judge, in his view as a critic, whether the symbolism could not be portrayed without all the anatomical details of the sexual act indicated in the two scenes, he stated that he supposed it could, but that in his view, it was done in the best most tasteful way (120a). Asked by the Presiding Judge whether the photographic depiction of the intercourse and the manipulation of the male's private organ was a tasteful way of showing the actor's dissent with taxes, war and politics, the witness stated that "it was a tasteful way and I base this on other reasons," that is, that it was more tasteful that the sex scenes one generally sees in movies which do not include genital organs . . . that it was so realistic that it was relatively normal compared to the hysterical and exaggeration that appear in the cleverly censored sex films (123a). Asked by the District Attorney whether he would show it to any cross-section of the public, he stated that he would and that it was a better sex movie to show to young people, say between the age of 18 and 22, than any others he had seen because it was the most realistic and the most benign as far as its outlook on sex was concerned (125a).

When the Presiding Judge pressed the further question on the discussion about taxes, war and politics and the time that such discussion took, the defense counsel objected on the grounds that during the course of the examination of the witnesses for the defense there had been more than 75% of the examination on cross-examination conducted by the Bench (129a), to which Judge Moldow replied, "We have to take note of the facts, that this is not the ordinary type of criminal case where we have to listen to witnesses who are there, and the

court was not there. The judges all saw this film and t
what we are talking about. . . ." (130a) Asked by the P
ing Judge whether he would characterize the statements
by either of the actors in the film with respect to war, po
and taxes, as a discussion of the subject implying a
change of ideas and views between two people or m
statements, such as I won't vote or I won't go, the wi
answered, "I think it was a conversation in the sense th
generally have conversations." (130a)

The petitioner, Sol Heller, testified on his own behal
stated on direct examination that he resided at 252 E.
Street, New York, N.Y.; that he was the theatre manager
Andy Warhol Garrick Theatre and had been for almos
years since it opened; that in the past eight years he had
with Consolidated Theatres of Connecticut and the Fox
ern Theatres and was the manager of the Cue Theatre T
Club. He stated that he had never been connected wit
crime or even arrested. (132a, 133a)

Asked whether there were any signs in the lobb
the theatre, he stated that the lobby in the Garrick Th
was small and that immediately to the right, not more
five feet into the theatre was the box office; that it w
normal box office with a window, with a cut in the glass
that there were three signs about 7 by 9 inches in size;
one of the signs was a schedule, one was the price, an
third had a big X, with white letterings on a black backg
saying "No one under 17 admitted"; (133a) he stated tha
house was a 299-seat house and that he hired all of the
ployees; that some of his cashiers were permanent and o
were temporary; that such persons were instructed that if
one was obviously under 18 years of age, that identific
must be demanded and would have to be a driver's licen

draft card, or something that would actually tell the age. He said he would not allow anyone under 18 in the theatre, even if it was a child of an adult (135a). He stated that he was at the theatre from 10:30 in the morning to about 2:30 in the afternoon, and from 6:00 or 7:00 in the evening until midnight, seven days a week (135a). He stated that to his understanding the film had played at the Repertory Theatre in San Francisco without incident (135a) and that it played there for seven days; He stated that if the picture had been declared by any judicial tribunal in the State of New York to have been obscene, he would not have played it at the Garrick Theatre. (136a).

On cross-examination, the petitioner stated that he had seen the movie before, and that he or an usher was present at every performance to collect tickets. Asked how many different cashiers he has had in the past six months, he stated ten (137a). He stated that while 17 is the legal age in New York, he arbitrarily set the admission age at 18 (138a).

Thereafter, the defendant rested his case and the People rested their case (138a).

At the end of the entire case, defendant moved to dismiss, emphasizing alleged constitutional deficiency in the search and seizure procedure, which did not provide any prior adversary hearing. The motion was denied and the defendant was found guilty by the unanimous court. The petitioner was thereafter sentenced to pay a fine of $250.00 or to serve 3 days in jail. He paid the fine.

On appeal to the Appellate Term, petitioner contended that the film is not obscene and argued that the film should not have been seized pursuant to a search warrant because he was not given an opportunity for an adversary hearing prior to the issuance of the warrant. The Appellate Term, which had

viewed the film, affirmed the conviction without opinion. One Justice dissented on the ground that the film was not obscene (179a-180a).

On appeal to the New York Court of Appeals, petitioner again argued that an adversary hearing rather than an ex parte judicial determination is necessary before a search warrant for an obscene film may be issued and the movie seized. He also asserted that "Blue Movie" was not obscene. The Court of Appeals viewed the film and the 5-judge majority found it to be obscene. The majority also rejected the argument that this Court's previous decisions mandate an adversary hearing prior to the issuance of a search warrant for allegedly obscene films, particularly where the issuing magistrate has personally seen the film in question. The contrary view of the United States Court of Appeals for the Second Circuit in Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (1969), cert. den. 397 U.S. 920 (1970), and Astro Cinema Corp. v. Mackell, 422 F.2d 293 (1970), was rejected as "beyond any requirement imposed on State courts by the Supreme Court." People v. Heller, 29 N.Y.2d 319 (1971) (181a-185a). A 2-judge dissenting opinion, written by Chief Judge Fuld, said that the film is not obscene; therefore, the search and seizure issue need not be reached (185a-186a).

## SUMMARY OF ARGUMENT

### I.

The manner in which the Petitioner has phrased the jurisdictional question: namely, "A prior adversary hearing involving First Amendment rights such as a moving picture film is not a question of discretion, but is a matter of fundamental constitutional rights. The Petitioner herein was entitled, as a matter of constitutional law, to a prior adversary hearing before the seizure of 'Blue Movie' was effectuated" obscures the basic legal issue which is before this Court. Amicus submits that to resolve this multi-phased jurisdictional question requires that the responsive proposition be more narrowly drawn and refined. If Petitioner has a claim for denial of due process, he must be able to delineate the duties he claims were breached, and show wherein the State of New York has failed to do something which the law requires. By way of reply, Amicus' analysis is pointed in the opposite direction, i.e., toward establishing that the State of New York, in proceeding as it did, has breached no duties under the Federal Constitution. Accordingly, Amicus' brief is drafted along lines which affirmatively establish that due process was accorded Petitioner at each of the three stages of the criminal proceedings herein: (1) At the arrest; (2) when the film print was seized, and (3) when the film print was admitted into evidence.

Petitioner was arrested pursuant to an arrest warrant for showing an obscene movie to the general public. The arrest warrant had been issued by a Criminal Court judge who himself had seen the film before issuing the arrest warrant. The arrest warrant was also a search warrant containing authorization to seize the film "Blue Movie." Respondent has opted for an affirmance based solely upon the precautionary

search warrant procedure employed by the State, which paralleled the arresting process. The search procedure required a judge to secretly view the film himself prior to the issuance of the search warrant. Amicus is of the view that such procedures demean the authority of the judiciary and submits that a different approach should be employed which analyzes the seizure of "Blue Movie" as an incident to the execution of the arrest warrant. It has been held in New York, in several cases, that a police officer has the right to make a warrantless arrest for the crime of exhibiting an obscene motion picture film to the general public. Amicus submits that if that holding is good law, then, a fortiori, an arrest pursuant to an arrest warrant is also proper.

For the State of New York to prevail in warrantless arrests, three broad principles must be established: (1) A valid law; (2) statutory authority for the arrest, and (3) probable cause for the arrest.

The public policy of New York is strongly aligned against the public exhibition of obscene motion picture films. New York Penal Law Section 235.05 provides for criminal sanctions and Penal Law Section 410.00 specifically provides that films which are used to project pornographic motion picture films are contraband. That section defines pornography as a motion picture showing acts of sexual intercourse, which is exactly what "Blue Movie" is.

By virtue of a specific statute and the ruling case law in New York, Deputy Inspector Smyth had the authority to arrest a person without a warrant for a misdemeanor committed in his presence. The decisions of this Court indicate that rules such as these governing arrests are authorized by the Constitution to meet the practical demands of effective criminal investigation and law enforcement.

Whether a particular arrest without a warrant is constitutional or not depends *solely* upon whether, at the moment the arrest was made, the officer had "probable cause" to make it. Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which he has reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. When the constitutionality of an arrest is challenged, it is the function of this Court to determine whether the facts available to the officer at the moment of the arrest would warrant a man of reasonable caution in the belief that an offense had been committed.

Petitioner claims that no obscenity arrest can be validly executed until the question of obscenity has first been litigated in a criminal court of law. That claim is highly unorthodox. A lone dissenting judge in Ohio v. Albini, stated the claim as "an unlawful delegation to the police of the plenary duty of the courts to determine whether there is probable cause to believe films obscene after argument by both parties." Those arguments were foreclosed by this Court's decision in Gable v. Jenkins, 397 U.S. 592. It seems obvious from Gable v. Jenkins that the State could have arrested Petitioner on the obscenity charge and, without seizure, proven their case by testimonial evidence of what the officer saw and heard.

The Kentucky Court of Appeals in Roaden v. Kentucky, October Term No. 71-1134, also being argued with this case, acted well within the scope of its authority when it decided that an obscenity arrest did not call for an exception to the general rule under Kentucky law as to warrantless arrests, where Kentucky procedures permitted the petitioner to con-

test the issue of probable cause as an ancillary matter i
the criminal trial, either by way of motion to suppress or re
store, or in an independent civil action to restore the proper
ty. The Kentucky Court of Appeals' solution is the majorit
view at the present time. Several of the lower courts in Ne
York have followed this rule in movie cases and the Ne
York Court of Appeals has done likewise in the case of a
arrest for printed matter.

In deciding this question, this Court must also keep i
focus the due process considerations which support the Ne
York State Obscenity Statute. Those include the universa
verity that obscenity is a public nuisance which is abatabl
under the law, the the ethical values shared by this Natio
as a whole as defined in the state, federal and city morality
laws. These values exist for the benefit of the family uni
which is at the very core of government in our Judaeo
Christian culture.

It was Deputy Inspector Smyth's sworn duty to enforc
the state policy against obscenity and uphold the law
Whether Deputy Inspector Smyth's arrest of the Petitione
was constitutional or not, depended upon whether or not h
had probable cause to make the arrest. The factual issue
of probable cause depends upon two factors: (1) The nature
of the film itself – the autoptical evidence, and (2) the
capacity of a peace officer to evaluate obscenity in the ligh
of the *Roth* standards. Petitioner's claim that a peace offi-
cer, an Assistant District Attorney, and a Judge all lack
such capacity was recently made to and rejected by the Ohio
Supreme Court as they have been by the majority of courts
which have considered that problem. Independent of the
personal capacity of Deputy Inspector Smyth to make value
judgments regarding the *Roth* standards, the record shows

that Smyth viewed the film in its entirety both on the day before and the day after its viewing by the District Attorney, who was responsible for Judge Goldberg's viewing of the film thereafter. "Probable cause" was established to Judge Goldberg's satisfaction. Petitioner having failed to attack the arrest warrant is precluded from denying that "probable cause" existed.

Society has a legitimate interest in suppressing crime and detecting criminals which requires: (1) That evidence be preserved intact; (2) that autoptical evidence be preferred over testimonial evidence, and (3) that the right of officers to seize the instrumentality of the crime itself be upheld as a deterrent to crime.

When there is an arrest for the exhibition of an obscene film, an emergent condition exists – the positive film print which was used for projection must be preserved intact so as to prevent alteration or cutting. The state cannot purchase a copy, nor if they were able to, could it be assured that the same would be the identical version. Some courts have called the print "indispensable evidence," in others, such as California, the courts have called it the "best evidence." In any event, it is the instrumentality of the crime, and it has been recognized many times that, without it, the prosecution must fail or be subject to reversal upon appeal. To prohibit the seizure of such evidence under these circumstances, would completely frustrate criminal prosecution.

It is not a "search" where an officer observes contraband which is clearly visible from a place where an officer has a right to be, and the New York Court of Appeals so held in the Matherson case, where the seizure of obscene material incident to an arrest was not massive and was limited to the instrumentality of the crime. Even were this not so, the

seizure herein was within the reach authorized by Chimel v. California, 395 U.S. 752.

Granted the law's preference for search warrants, a state is not required to resolve all such issues on the practicability of obtaining a search warrant. Under Ker v. California, 374 U.S. 231, a state court is entitled to rely upon this Court's express invitation for state courts to develop workable rules governing arrests and seizures, and is authorized to choose a state rule under which administrative "probable cause" would be examined judicially *after* an arrest by a peace officer.

By waiving a pre trial Motion to Restore the Film and the preliminary hearing, both of which procedures were open to him under New York law, Petitioner is now foreclosed from arguing prior restraint and First Amendment principles.

Petitioner was not deprived of due process when the positive film print was admitted into evidence at the trial. The District Attorney during his case in chief showed a complete evidence chain of the film's custody from the time it was first taken into the possession of Deputy Inspector Smyth at the time of the arrest until it was received in evidence as People's Exhibit 1. Further, the film was stipulated into evidence on agreement of the Prosecutor and Defense Counsel. (Page 63 herein.)

The search for objective truth requires that the law search out and preserve an autoptical evidence that which constitutes the instrumentality of the crime. Such trustworthy evidence will not only serve to convict the guilty, but it may also, in a proper case, serve to free the innocent.

The past decisions of this Court do not support Petitioner's claim that the denial of an adversary hearing prior to arrest and seizure amounts to a violation of due process of

law. Petitioner's claim is of recent origin, having evolved out of the 1966 October Term reversals and the language of certain members of this Court, taken out of context in Marcus v. Kansas City Search Warrants, 367 U.S. 717 (1961), A Quantity of Books v. Kansas, 378 U.S. 205 (1964), and Lee Art Theatre v. Virginia, 392 U.S. 636 (1968). The A Quantity of Books case concerned not a criminal prosecution but an auxiliary means of attacking obscene materials – criminal suppression of all copies through injunction, a form of relief given limited approval in Kingsley Book Inc., v. Brown, 354 U.S. 436 (1957). Such injunctive statutes are not always surrounded by the due process safeguards which automatically attend crimilar prosecutions. The seizure of all copies, as in A Quantity of Books, pursuant to an injunction, may impinge directly on the First Amendment, whereas a seizure of a single copy as evidence, antecedent to a criminal prosecution, is cognizable under the Fourth Amendment.

A chronological history of the cases demonstrates that misunderstandings have been placed upon the A Quantity of Books decision, stemming from a failure to distinguish its prior restraint civil aspects from criminal cases involving a seizure to obtain evidence for a criminal prosecution. Such misunderstandings have brought about a rash of bad law and chaos in this area of the law, including confrontations between state and federal courts of the order which resulted in the enactment of U. S. Code, Sections 2281 and 2284. One comes away from a study of these cases with the conclusion that the results obtained depend not upon established principles of law but rather upon the personal philosophy of the members of the Court writing the opinion.

Amicus submits that a state is not required to create an

exemption to the traditional right of a police officer to seize evidence incident to an arrest. A distinction must be drawn between administrative probable cause determinations and judicial probable cause determinations. If the state judiciary prefers to test the officer's judgment after arrest by providing for an immediate adversary hearing procedure after arrest, there can be no serious claim of a constitutional infringement.

If, for no other reason than practicality and necessity, the right of those who administer the law to make an administrative determination of probable cause must prevail. With the judicial work load being what it is, this Court cannot afford to make it a constitutional requirement that the trial court undertake adversary proceedings inquiring into every film, magazine, etc., that is manufactured, exhibited, sold, or offered for sale or exhibition, to see whether or not there is probable cause to determine the same to be the proper subject for an obscenity charge.

II

The motion picture film "Blue Movie" is obscene in the "international" sense – "hard-core pornography." As such it is condemned under our federal constitution. In its opinion in *Roth-Alberts*, this Court noted that it was the universal judgment of civilized nations that obscenity should be proscribed.

It is a "Judaeo-Christian" culture which this Court is called upon to interpret. According to that "Judaeo-Christian" base, each citizen has and enjoys a personal civil right to live in an area which is free of the debasing influence of public indecency.

During the past 15 years, a blanket of confusion has engulfed the motion picture production area. That industry's understanding of the public responsibility which it bears under this Nation's obscenity laws has been almost destroyed. Such confusion is due in no small part to the failure of this Court to enunciate a judicial philosophy which truly reflects the public mores which have governed this Nation since its founding. A casual reference to, and brief reflection on the moral laws of this Nation dealing with sexuality shows that such public mores do *presently* exist and codify the *"National standards"* which this Court has been seeking to enunciate. Amicus has attached at Appendix B a state-by-state survey of those laws which deal with lewdness, indecent exposure, obscenity, prostitution, sodomy, adultery, fornication, incest and profanity.

Under New York Penal Law section 410.00, et seq. a motion picture film showing acts of sexual intercourse (with stated exceptions not here applicable) is declared to be contraband as pornography and subject to seizure. This Court cannot disregard the plain meaning of the English language of those sections.

This Court has on many occasions stressed community ethical values as the basis for constitutional adjudication and has repeatedly said that "In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that the primary requirements of decency may be enforced against obscene publications." This Court has also said that the values of the culture can often be detected from the practices of the states. In reviewing the New York Court of Appeals' ruling that "Blue Movie" is hard-core pornography and in violation of that state's obscenity laws, the background of this Na-

tion's well-established ethical values must be considere
and weighed in the balance.

One just does not fornicate in public, be it actual
simulated – nor may he on the motion picture screen. Thos
"values" exist for the benefit of the family unit which is
the very core of government in our Judaeo-Christian culture

The common standards of right and wrong, as embodied
the law, require that the film "Blue Movie" be held to
obscene as a matter of law. The Courts have always be
willing to take judicial notice of facts of a common or ge
eral knowledge which are incontrovertible.

The performance of sexual intercourse in public, whethe
real or simulated, live or as part of a motion picture film
against public policy and obscene per se.

Where obscenity per se exists, the Court can take jud
cial notice of that fact, and no further evidence on suc
issue is necessary. The test, as repeatedly voiced in th
courtroom, for obscenity per se is; "whether reasonabl
men could not differ, and could come to but one conclusio
i.e. that the material or performance is sexually morbi
grossly perverse and bizarre."

The suppression of "Blue Movie" through criminal pros
cution is not "thought control." The interest being prote
ted is the peoples right to control *public morality* – a ten
amendment right guaranteed by the Bill of Rights. The pe
tioner may not claim "thought control" through "prior
straint" where the interval between seizure of one copy
the film, as evidence, and the final decision of the tri
court has been only 48 days.

Obscenity and lewdness have long been the subject
criminal sanctions under the common law for the reason th
the great majority of people believe that the morals of "ba

people do, at least in the long run, threaten the security of the "good" people.

On this latter point, this Court has recognized in *Mugler v. Kansas* that the power to determine what is offensive to public morality is lodged in the legislative branch of government, and not in this Court. This Court's rulings in *Redrup v. New York* and later cases citing *Redrup*, are a clear violation of the principle voiced in *Mugler v. Kansas*.

The indirect effects of obscenity were recognized by Justice Harlan in *Roth-Alberts* where he stated: "The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards." The long range, indirect effects inference, acknowledged by Justice Harlan, was also recognized by a majority of this Court in *Ginsberg v. New York*.

## ARGUMENT

### INTRODUCTION

When this Court, a little over 15 years ago, heard arguments on the obscenity issue in *Roth v. U.S.*, 354 U.S. 476, hard-core pornography was a rarely seen under-the-counter item. At that time, the Federal Government worked hard at keeping it under control. In the Government's brief in *Roth v. U.S.*, (at page 34) the Solicitor-General identified "hard core pornography" as one of three categories of materials which were caught in the net of the Federal Obscenity Statute, and estimated the same to encompass 90% of the total materials actually caught under the Federal Statute. To make sure that the individual members of this Court understood what was meant by that "underworld" term and

that rarely seen item, the Solicitor-General, by letter to th
Clerk of this Court, dated Apr. 19, 1957, sent numerou
samples of actual hard-core pornography to the Cour

Somehow, the moral climate in these United States ha
changed during the past 15 years – a deterioration of maj
proportions has taken place which, in turn, has itsel
back into the system, and accelerated the rate of declin

An attempt has been made herein to rivet this Cour
attention on reality by following Solicitor-General Ranki
illustrative argumentation noted above. Attached to th
brief, at Appendices C thru I are photographic represen
tions, by way of time-motion studies, of a cross-section
the motion picture fare currently playing in New York a
across the Nation. Amicus would emphasize that such fil
are no longer the under-the-counter items which this Co
considered 15 years ago, and the justices of this Court,
considering the nature of their individual responses here
would do well to re-examine the moral arguments made
the Solicitor-General in his brief in *Roth v. U.S.*, supra (S
Briefs of Counsel, appearing at 1 L.Ed.2 2199-2203) a
take a long view at what is happening. In the year 19
those films are playing, without police opposition, whi
has been "throttled" by the rulings of this Court.

Attached to this brief, at Appendix A, is a time-moti
study of the motion picture film "Un Chant D'Amour" he
to be obscene by this Court on June 12, 1967. In compari
that time-motion study with others appearing herein, Amic
is reminded of Judge L. Thaxton Hanson's inquiry of "Wh
is going on here?", raised in his opinion in *Cinema Clas
ics, Ltd. v. Superior Court of Calif.*, a copy of which appea
at Appendix "A" in the Brief Amicus Curiae of Charles
Keating, Jr. in *Roaden v. Kentucky*, No. 71-1134.

I

DUE PROCESS OF LAW WAS ACCORDED THE PETITIONER AT EACH OF THE THREE STAGES OF THE CRIMINAL PROCEEDINGS BEING CONTESTED HEREIN, i.e.: (1) AT THE TIME OF PETITIONER'S ARREST ON A CHARGE OF SHOWING AN OBSCENE MOVIE TO THE GENERAL PUBLIC; (2) WHEN THE POSITIVE PRINT USED BY PETITIONER TO PROJECT THE VISUAL IMAGES AND SOUND TRACK WAS SEIZED INCIDENT TO THE ARREST AS EVIDENCE BEARING ON THE CHARGE, AND (3) WHEN THE POSITIVE FILM PRINT WAS ADMITTED INTO EVIDENCE AT THE TRIAL, FOLLOWING THE STATES LAYING OF THE PROPER FOUNDATION IN THE CHAIN OF EVIDENCE.

**A. Petitioner Was Not Deprived Of Due Process When He Was Arrested by Deputy Inspector Smyth on a Charge of Showing an Obscene Movie to The General Public.**

The warrant which Judge Goldberg issued was, in reality, an *arrest warrant*. (See Statement of Fact at page 62 ). The "seizure" authorization contained therein was nothing that a New York police officer executing *any* arrest warrant did not already have *by operation* of law. Petitioner may not, ipse dixit, convert a simple arrest problem, involving an arrest for a Class A misdemeanor committed in public, into a search and seizure masquerade. A decision favorable to the People in *Roaden v. Kentucky*, No. 71-1135, being argued with this case, also decides this appeal.

Deputy Inspector Smyth arrested the Petitioner under the authority of an *arrest warrant* for showing an obscene movie to the general public. It has been held, and rightfully so, that a police officer in the State of New York can make a *warrantless arrest* for exhibiting an obscene movie to the general public, *New York v. Lake Ronkonkoma Theater Corp.* 59 Misc.

2d 438 (Mar. 6, 1969). Compare *New York v. Matherson*, 16 N.Y.2d 509. In the *Lake Ronkonkoma Theater* case, the Court noted at page 442:

> "The New York State arrest statute, subdivision 1 section 177 of the Code of Criminal Procedure, provides:
>
> "A peace officer may, without a warrant, arrest a person
>
> "1. For an offense committed or attempted in his presence, or where * * * (he) has reasonable grounds for believing that an offense is being committed in his presence."
>
> In the situation present, two police officers, as customers within public premises, saw and heard a film, the same film which was exhibited at the hearing. After viewing said film and hearing argument of counsel, this court finds the "absolute" of probable cause to have been present, and also finds the "absolute" of statutory authority to arrest present."

*If a police officer can make a warrantless arrest under such circumstances, it must follow that due process is not violated when the arrest is made, as in the case herein, under an arrest warrant issued by a judge who, himself, has seen the film.*

For the people to prevail in a warrantless arrest situation against a claim of denial of due process of law, three broad principles of law need only be established: (1) A valid law; (2) statutory authority for the arrest, and (3) probable cause for the arrest. See *New York v. Lake Ronkonkoma Theatre*, 59 Misc.2d 438 at 442 (Mar. 6, 1969).

**1. A Law Which Proscribes The Public Exhibition of Obscene Films And Designates The Same To Be a Misdemeanor Crime is Constitutional As A Valid Exercise of The Police Power of the State.**

The public policy of the State of New York is strongly aligned against the public exhibition of motion picture films. Section 235.05 of the New York statutes provides for criminal sanctions:

"Section 235.05, Obscenity. A person is guilty of obscenity when, knowing its content and character, he:

1. Promotes, or possesses with intent to promote, any obscene material; or

2. Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity.

Obscenity is a Class A misdemeanor."

The terms of the New York obscenity statute are clearly defined. Section 235.00 provides as follows:

"235.00 Obscenity; definition of terms.

"The following definitions are applicable to sections 235.05, 235.10 and 235.15:

"1. 'Obscene.' Any material or performance is 'obscene' if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

"2. 'Material' means anything tangible which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or in any other manner.

"3. 'Performance' means any play, motion picture, dance or other exhibition performed before an audience.

"4. 'Promote' means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same."

The state legislature has made it crystal clear that the statute applies to films such as "Blue Movie," which depict sexual intercourse. New York Penal Law section 410.00 specifically provides that films which are used for "projecting . . . pornographic . . . motion pictures" are contraband and the subject of seizure by a peace officer. New York Penal Law section 410.00 (9) further states.[17]

"9. For the purposes of this section only, a pornographic . . . motion picture, is defined as a . . . motion picture showing acts of sexual intercourse or acts of sexual perversion. This section shall not be construed as applying to bona fide medical photographs or films.."

That conduct, such as was engaged herein, may be lawfully proscribed as a crime under the police powers reserved to the states by the Tenth Amendment to the Federal Constitution is beyond question. See *Alberts v. Calif.*, 354 U.S. 476, 485, 493, (June 22, 1957); reaffirmed by this Court during the 1970 October Term in *U.S. v. Reidel*, 402 U.S. 351, 355, 28

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[17]As to whether New York Penal Law section 410.00(9) applies to "Blue Movie" see the time-motion study of "Blue Movie" appearing herein pages 26-60.

L.Ed.2d 813, 817, 91 S.Ct. 1400 (May 3, 1971), where this said, at page 355:[18]

"The Court considered this sufficiently clear to warrant summary affirmance of the judgment of the United States District Court for the Northern District of Georgia,

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[18]Just 15 years ago, a majority of this Court noted that such was the universal judgment. In *Roth-Alberts*, 354 U.S. 475, 485, this Court stated:

"But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored *in the universal judgment that obscenity should be restrained*, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571, 572, 86 L.Ed. 1031, 1035, 62 S.Ct. 766; . . . :" (Our emphasis.)

Were this Court now, when hard-core pornography is so rampant (see footnotes 7 and 8) to apply its reasoning in earlier mass seizure and prior restraint cases, such as *Marcus v. Kansas City Search Warrants*, 367 U.S. 717 (1961) and *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964) (when the presence of obscenity of a lesser degree was only beginning to be felt) it would be guilty of fundamental error, for it would be contrary to the basic truth that this Nation was *not* constructed in a moral vacuum. The possibility of such a basic philosophical error is suggested in the comments of certain of the Justices during argument in *Paris Adult Theatre Inc. v. Slaton* on October 19, 1972 and in recent dictum appearing in the last paragraph of the majority opinion in *U.S. v. Reidel*, 402 U.S. 351, 28 L.Ed.2d 813, 818, 91 S.Ct. 1410 (May 3, 1971) and is epitomized by the last paragraph thereof, reading "Roth and like cases pose no obstacles to such developments." Amicus submits that the contrary holds true and that there is, *as a matter of law*, an inherent civil right which adheres in each citizen by virtue of his national citizenship in this Judaeo-Christian Nation, to be free from the unnatural and debasing influence of hard-core pornography. — at least, that is an advantage which Amicus understood to flow from our heritage, the Nation's obscenity laws and the decision handed down by this Court in *Roth v. U.S.*, 354 U.S. 476, 485 (1957) on the "universal judgment that obscenity should be restrained." See also Justice Harlan's views in *Roth v. U.S., supra*, at 508 re the federal role where hard-core pornography is found.

rejecting claims that under Stanley v. Georgia, Georgia's obscenity statute could not be applied to booksellers Gable v. Jenkins, 397 U.S. 592, 25 L.Ed.2d 595, 90 S.Ct. 1351 (1970)."

**2. Under New York Law, Deputy Inspector Smyth As A Police Officer Had The Authority To Arrest a Person Without A Warrant For A Misdemeanor Committed In His Presence.**

At Common Law, an arrest for an offense less than a felony could not be made without a warrant unless it also involved a breach of the peace, using the latter phrase in the narrow sense of a public offense done by violence, or one causing or likely to cause an immediate disturbance of public order. A few of the modern statutes limit the authority of the peace officer to arrest without a warrant for a crime committed in his presence to the same extent as it was limited at Common Law; but in a great majority of the states at the present time, a peace officer has authority under the statutes to arrest for any public offense committed in his presence. Perkins, Elements of Police Science, at 250; 1 Antieau, Modern Constitutional Law, at 262.

This Court has recognized that the states are not precluded from developing workable rules governing arrests to meet "the practical demands of effective criminal investigation and law enforcement." *Ker v. Calif.*, 374 U.S. 23, 34, 10 L.Ed.2d 726, 738, 83 S.Ct. 1623 (June 10, 1963) and in *Johnson v. U.S.*, 333 U.S. 10, 15, 92 L.Ed. 436, 441, fn. 5, 68 S.Ct. 367 (1948) has stated that: "State law determines the validity of arrests without warrants." It has generally been recognized that where a statute so permits, a peace officer may lawfully arrest without a warrant one who has committed

or is committing a misdemeanor in his presence or within his view, even thuugh it does not amount to a breach of the peace, 6 C.J.S., Arrests, Sect. 6, at page 589, and such procedures traditionally have been thought to be constitutional. *Johnson v. U.S.*, 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367 (1948). Following the majority rule, the State of New York, by statute, has granted such authorization to peace officers. See New York State arrest statute, subdivision 1 of section 177 of the Code of Criminal Procedure, cited in the *Lake Ronkonkoma Case*, supra, at page 442:

> "A peace officer may, without a warrant, arrest a person 1. For an offense committed or attempted in his presence, or where . . . (he) has reasonable grounds for believing that an offense is being committed in his presence. . ."

See *New York v. Sessa* 43 Misc.2d 24, 250 N.Y.S.2d 193.

### 3. Whether A Particular Arrest Is Constitutional or not Depends Upon Whether At The Moment The Arrest Was Made, The Officer Had "Probable Cause" To Make It.

In *Ker v. California*, 337 U.S. 23, 34, 10 L. Ed.2d 726, 739, 83 S.Ct. 1623 (June 10, 1963), it was recognized that, in order for an arrest without a warrant to be lawful under the Constitution, it had to be based upon "probable cause."[19]

In *Draper v. U.S.*, 358 U.S. 307, 3 L.Ed.2d 327, 79

[19] While it has been suggested in a different context (in the home) that warrantless probable-cause arrests may not be made in the absence of exigent circumstances and that, given the opportunity, the arresting officer must seek a warrant, the case law in this area holds otherwise. See Mr. Justice White dissenting in an opinion in which the Chief Justice joined in *Coolidge v. New Hampshire*, 403 U.S. 443, 511, footnote 1, 29 L.Ed.2d 564, 609, footnote 1, 91 S.Ct. 2022.

S.Ct. 329 (1959), this Court recognized that "probable cause" as the name implies, involves probabilities; that these are not technicals, but are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians act; and that probable cause exists where the facts and circumstances within the arresting officers' knowledge and of which they have reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

The standards applicable to the factual basis supporting the officer's probable-cause assessment at the time of the challenged arrest are at least as stringent as the standards applied with respect to the magistrate's assessment. *Whiteley v. Warden of Wyoming State Penitentiary*, 401 U.S. 560, 566, 28 L.Ed.2d 306, 312, 91 S.Ct. 1031 (Mar. 29, 1971). such standards, however, do not require that quantum or quality of proof which is necessary to establish guilt. "Probable cause" for an arrest may exist even though the person arrested turns out to be innocent. *Henry v. U.S.*, 361 U.S. 98, 102, 4 L.Ed.2d 134, 138, 80 S.Ct. 168 (Nov. 23, 1959).

The question is not whether the person responsible for the arrest thought the facts to constitute probable cause, but whether the Court thinks that such facts constituted probable cause. *Director General of Railroads v. Kastenbaum*, 263 U.S. 25, 68 L.Ed. 146, 44 S. Ct. 52 (1924). When the constitutional validity of an arrest is challenged, it is the

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[20]Petitioner's attack, both in the Court of Appeals below and here, does *not* draw in issue "the facts available to the officer at the moment of the arrest." His argument is that such an inquiry is not apposite, and that, as a matter of law, in a case such as this, no set of facts will justify a warrantless arrest by an officer. See Statement of the Case at page 65 where the trial court pointed out his failure to attack the arrest warrant.

function of this Court to determine whether the facts available to the officer at the moment of the arrest would warrant a man of reasonable caution in the belief that an offence had been committed. *Beck v. Ohio*, 179 U.S. 89, 13 L.Ed.2d 142, 148, 85 S. Ct. 223 (1964).

**4. The Petitioner Is In Error When He Claims That the "Probable Cause" Determination Which Must Precede and Which Authorizes An Arrest for An Obscenity Crime Is The Exclusive Province of The Judiciary and May Only Be Made After An Adversary Hearing.**

The Petitioner's attack herein on the arrest does not center on traditional "probable cause" concepts; rather it flows from the highly unorthodox claim that "probable cause" in movie cases may not be determined by either a peace officer, a district attorney, or a judge at an ex parte hearing, and that no obscenity arrest can be validly executed until the question of obscenity has first been litigated in a civil court of law.[21] The Petitioner's claim is succinctly stated

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[21] What is Petitioner prepared to say about the policy of the law which gives the grand jury the right to determine "probable cause?" See Ex Parte U.S., Pa., 53 S.Ct. 129, 287 U.S. 241, 77 L.Ed. 283 and 22 C.J.S. Criminal Law, Sect. 345 at p. 893, reading:

> "The finding of an indictment, fair on its face, by a properly constituted grand jury, *conclusively* determines the existence of probable cause. . . ." (Our emphasis.)

See also 22 C.J.S. Criminal Law, Sect. 356, at p. 916, reading:

> "Under the Federal Rules of Criminal Procedure, Rule 30(b)(3) 18 U.S.C.A. where the prosecution is by indictment, constitutes conclusive proof of reasonable cause. . . ."

In *California v. Luros*, 92 Cal. Rptr. 833, 480 P.2d 633 (Feb. 18, 1971) the California Supreme Court reinstated a grand jury obscenity indictment saying, at p. 636:

> "It is not necessary, however, that evidence of contemporary community standards be received on the issue of probable cause. (See Aday v. Superior Court, *supra*, 55 Cal.2d

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in the dissent of Justice Brown of the Ohio Supreme Court in *Ohio v. Albini*, 31 Ohio St.2d,27, at 34 (July 5, 1972)[22] where in he stated the basic proposition to be as follows:

> "The holding of the majority today constitutes an unlawful delegation to the police of the plenary duty of the courts to so determine whether there is probable cause to believe the films obscene after all parties have had an opportunity to express and present to the best of their ability the Roth considerations. Although the seizure of the film in question was incident to an arrest, *the arrest itself* - and hence the seizure - is invalid. In the absence of a prior judicial hearing to determine *probable cause* to believe the film obscene,

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at pp. 798-799, 13 Cal. Rptr. 199, 362 P.2d 47.) A determination of obscenity may therefore be made by a grand jury, insofar as the issue of probable cause is concerned, without the necessity of receiving evidence as to such standards." (226 Cal.App.2d at p. 531, 38 Cal. Rptr. at p. 206.)

See also *California v. Cimber*, 76 Cal. Rptr. 382, 384 (Feb. 10, 1969) and *California v. Samblad*, 103 Cal. Rptr. 211, 215 (July 20, 1972).

[22]In the *Albini* case, several members of the Columbus, Ohio Police Department entered the theater, viewed segments of the film, arrested the manager and seized one copy of the film. In affirming Albini's conviction, the Ohio Supreme Court agreed with the rule of law adhered to by the Kentucky Court of Appeals in its judgment in *Roaden v. Kentucky*, 473 S.W.2d 814, cert. granted in 31 L.Ed.2, 815 (Apr. 24, 1972).

The probable cause issue which precedes arrest is an *administrative matter for the law enforcement officer or agency*. See *Ohio v. Shackman*, 278 N.E.2d 61, 63 (May 20, 1971) where the court said:

> "The procedure requested by the defendant would place the court in the position of a law enforcement officer or agency . . . in effect the defendant wants the court, in an adversary hearing to determine if there is probable cause to believe a crime has been committed and that an arrest should be made or evidence seized. *This is not the function of the court.*" (Our emphasis.)

the arrest is the product of the unlawful delegation of authority. . . ."

Such an argument, however, was foreclosed by *Gable v. Jenkins*, 397 U.S. 592(1970), relied upon by this Court in *U.S. v. Reidel*, supra, at page 355.[23] The basis of the attack in the Federal District Court in Gable v. Jenkins, 309 F. Supp. 998, at 1001, was the appellant's claim that the Georgia statute was "unconstitutional" in that it did not provide for a prior judicial hearing *before arrest*. In *Gable*, The Federal District Court noted that any question as to the admissibility of illegally obtained evidence, seized incident to an arrest, was an independent question which was unrelated to the adversary hearing issue and that, *where a prosecution under the state statute could be "based on other legally obtained evidence," an adversary hearing was not necessary.*

It seems obvious from *Gable v. Jenkins*, that it would have been possible for the State of New York to prosecute Heller and avoid the "adversary hearing" issue by the simple expediency of making the arrest without seizing the film.[24] Under that strategy, the district attorney, however,

[23]See also *Milky Way Productions, Inc. v. Leary*, 305 F. Supp. 288, 296-297, affirmed by this Court in *New York Feed Co. v. Leary*, 397 U.S. 98, 25 L.Ed.2d 78, 90 S.Ct. 817; *Gornto v. Georgia*, 178 S.E.2d 894, 896 (Dec. 3, 1970), cert. den. 402 U.S. 933, 28 L.Ed.2d 868, 91 S.Ct. 1525 (Apr. 26, 1971); *U.S. v. Fragus*, 428 F.2d 1211 (5th Cir.). Compare the contrary analysis of *Milky Way* and *Fragus* in *New York v. Morgan*, 326 N.Y.S.2d 976, 980 (Sept. 2, 1971) and *Johnson v. City of Rochester, Minn.*, 197 N.W.2d 244, 246 (Apr. 28, 1972).

[24]Several prosecutors, in attempting to avoid the "adversary hearing" hurdle, have abandoned the use of autoptical evidence in favor of the more expedient testimonial evidence and other combinations. See *Calif. v. Goulet*, 98 Cal. Rptr. 782 (Oct. 28, 1971), *Calif. v. Enskat*, 98 Cal. Rptr. 646 (Sept. 21, 1971), *Bryers v. Texas*, 480 S.W.2d 712 (May 31, 1972), *Longoria v. Texas*, 479 S.W.2d 689 (Feb. 16, 1972). Amicus submits that for this Court to

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would have had to bargain away the use of autoptical evidence (the film) during his case in chief, for the more expedient testimonial evidence of others as to what they saw depicted on the public screen and heard at the time of the arrest.[25]

When faced with this "marshalling of evidence" problem in *Roaden v. Kentucky*, *supra*, involving a warrantless arrest

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fashion a rule which would make autoptical evidence less available would be a step backward in the advance of police science and the search for truth. See Perkins, Elements of Police Science, referred to in Point IC, *infra*, at page

[25]See *New York v. Morgan*, 326 N.Y.S.2d 976 (Sept. 2, 1971) where a New York police officer paid $5.00 admission fee to the Metropolitan Theater on 14th Street and viewed a film entitled "Anna's Banana," which ran 20 minutes and depicted the following, at p. 978:

> "a female masturbating by use of a cucumber . . . fellatio and cunnilingus . . . followed by an explicit act of sexual intercourse, toward the end of which, the male withdrew his organ and ejaculated in full view on the screen." He arrested the defendant without a warrant *but did not seize the film.* Judge Ringel denied the motion to dismiss, calling the subject matter as described "autoptically obscene" and holding, at page 980: "where probable cause exists to arrest for displaying an alleged hard-core motion picture film to the public an arrest without a warrant is lawful. There is no need for prior judicial scrutiny to validate such an arrest. . . ."

For a reply to Judge Ringel's and Justice Stewart's subjective "I know it when I see it" low watermark, see Federal District Judge Pettine's opinion in *U.S. v. 50 Magazines*, 323 F.Supp. 395 at 402:

> "It is not an overstatement to say that one's own tastes, values and standards have been molded by a set of stimuli which are unique to him and to his cultural milieu, and those standards *inevitably influence one's particular judgment as to what constitutes hard-core pornography. . . .*" (Our emphasis)

Amicus submits that the average American – yes, even a policeman – does know "lewdness" when he sees it. "Lewdness," after all, is what we have been talking about for 15 years, is it not? See *Alberts v. Calif.*, 354 U.S. 476, 488; and Justice Harlan, concurring in *Alberts v. Calif.*, at 501-503, and dissenting in *Lee Art Theatre v. Virginia*, 392 U.S. 636, at 638.

the Kentucky Court of Appeals decided that an obscenity arrest did not call for an exception to the general rule previously expressed by it in warrantless arrest cases in *Kentucky v. Lewis* 217 S.W. 2d 625, 309 Ky 276 (Feb. 1, 1949) that:

> "(2) evidence discovered by a search of the person, or his belongings in his immediate presence, upon his being legally arrested, is competent and admissible; (3) that an officer may lawfully make an arrest . . . if the misdemeanor is committed in his presence - from which it follows that any evidence discovered or found by the officer arresting the misdemeanorant will be competent under rule 2, supra . . . ."

where Kentucky procedure permitted the defendant to contest the issue of probable cause as an ancillary matter in the criminal case by way of motion to suppress or restore, or in an independent civil action to restore the personal property.[26]

Notwithstanding the utter confusion in this area, the Kentucky Court of Appeals' solution in Roaden, supra, is the majority view at the present time. See *Missouri v. Hartstein*, 469 S. W.2d 329, 332-334 (Apr. 12, 1971), reversed on other grounds in *Hartstein v. Missouri*, ___U.S.___, 30 L. Ed.2d 539, 92 S.Ct.___ (Dec. 14, 1971); *Wisconsin v. Kois*, 188 N.W.2d 467, 471 (June 29, 1971), reversed on other

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[26]Following *Mapp v. Ohio* 367 U.S. 643, 6 L.Ed.2 1801, the New York State Legislature added to the Code of Criminal Procedure a new Title II-B (Sections 813-c thru 813-e; Laws 1962, ch 954, effective April 29, 1962) codifying the procedure to procure the return of property unlawfully seized or the suppression of evidence procured in violation thereof. Petitioner herein took no steps to procure the return of the property or suppress the evidence. See Statement of the Case, herein, at page 65.

grounds in *Kois v. Wisc.*__U.S.___, 33 L.Ed.2d 312, 92 S.Ct.___(June 26, 1972); *Wisconsin v. O'Connell*, 192 N. W.2d 201, 205-206 (Dec. 14, 1971); *Ohio v. Albini*, 31 Ohio St.2d 27, 28 (July 5, 1972). See also *New York v. Morgan*, 326 N.Y.S.2d 976, 980 (Sept. 2, 1971) cf. *Washington v. Rabe*, 484 P.2d 917, 920 (Apr. 6, 1971) (affidavit and arrest warrant) reversed on other grounds in *Rabe v. Washington*, ___ U.S.___, 31 L.Ed.2d 258, 92 S.Ct. ___(Mar. 20, 1972) *New Jersey v. Osborne*, 285 A.2d 43, 46 (D.C.Ct. of Appeals, Dec. 10, 1971) (affidavit and search warrant); *North Carolina v. Bryant*, 183 S.E.2d 824, 825 (Oct. 20, 1971) (affidavit and arrest warrant): *U.S. v. Green*, 284 A.2d 879, 882 (Dec. 20, 1970) (affidavit and arrest warrant); *Scott v. Frey*, 330 F. Supp. 365, 367, (E.D.La., N. Orleans Div., June 30, 1971) (affidavit and arrest warrant); *contra, Johnson v. City of Rochester, Minn.*, 197 N.W.2d 244, 247 (Apr. 28, 1972); *Colorado v. Harvey*, 491 P.2d 563, 564 (Dec. 6, 1971); *Glass v. 8th Judicial District*, 486 P.2d 1180, 1181, (July 2, 1971). While the California rule is contrary when a particular class of motion picture film is involved, see *Flack v. Municipal Court of Anaheim*, 56 Cal.2d 981, 429 P.2d 192, 59 Cal. Rptr. 872 (July 3, 1967), the California procedure authorizes police officer affidavits in support of arrest and search warrants. See *Calif. v. DeRenzy*, 275 Cal. App.2d 380, 79 Cal. Rptr. 777 (Aug. 1, 1969), hearing denied by the California Supreme Court on Sept. 25, 1969. For an outline of the arrest procedure in Los Angeles County, see Federal District Judge Andrew Hawk's opinion in *Schackman v. Arnebergh*, 258 F.Supp. 983, 989-990 (Sept. 27, 1966).

It is Amicus' basic contention, that in deciding this question, this Court must also keep in focus the due process considerations which *support* the majority rule ex-

pressed above and the arguments made herein. Such would include the universal verity that lewdness and obscenity are public nuisances which are abatable under the law, and the ethical values shares by this Nation as a whole, as defined in the legislative halls and documented in state and federal statutes and city ordinances. This Court has on many occasions stressed community ethical values as the basis for constitutional adjudication. *Adamson v. California*, 332 U.S. 46, 91 L.Ed., 1903, 67 S.Ct. 1672 (Justice Frankfurter's concurring opinion). *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 470, 91 L.Ed. 422, 67 S. Ct. 374 (concurring opinion) In *Solesbee v. Balkom* (1950), 339 U.S. 9, 16, 27, 94 L.Ed. 604, 70 S.Ct. 457, reh. den. 339 U.S. 926, 94 L.Ed 1348, 70 S.Ct. 618, Justice Frankfurter wrote that due process

> "embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are, the less likely they are to be explicitly stated. But respect for them is of the very essence of the Due Process Clause. In enforcing them this Court does not translate personal views into constitutional limitations. In applying such a large untechnical concept as 'due process,' the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions."

The values of the culture, Justice Frankfurter added, can often be detected *from the practices in the states*. He illus-

trated the point in this fashion: "The manner in which the states have dealt with this problem furnishes a fair reflection, for purposes of the Due Process Clause, of the underlying feelings of our society about the treatment of persons who become insane while under sentence of death." The relevant historical facts under consideration encompass this Nation's ethical values, as set forth in the well-knit pattern of city, state and federal laws, relating to public sexual conduct (such as laws dealing with nudity, fornication, prostitution, indecent exposure, sodomy, solicitation of unnatural sex act, etc.). New York Penal Law section 410.00 is a crystal clear reflection of those ethical values - values which exist for the benefit of the family unit, which is at the very core of government in our Judaeo-Christian culture.

**5. Deputy Inspector Smyth Had "Probable Cause" To Make The Arrest.**

*(a) Deputy Inspector Smyth Had A Right and Duty Under The New York Statutes To Make A Value Judgement As To Whether The Film Was Obscene.*

In *Hosey v. City of Jackson*, 309 F. Supp. 527 at 534, footnote 9 (Jan. 22, 1970) the Court said as to the duty to seize a film print under such circumstances:

> "The right and even the duty of police officers to seize the evidence which was the very means or vehicle of the commission of a crime committed in the officers' presence is not, in this Court's opinion, affected by the holding in Chimel. . . ."

Whether Deputy Inspector Smyth's arrest of the petitioner is constitutional de pends upon whether or not at the time of the arrest he had "probable cause" to make the arrest on

the obscenity charge. That "factual" issue depends upon two factors (1) the nature of the film itself – the autoptical evidence, which was the subject of the arrest, and (2) the capacity of a peace officer and others to evaluate the obscenity of the film in light of the Roth standards and personal observations. See *Schmerber v. Calif.*, 384 U.S. 757, 769, 16 L.Ed.2d 908, 918, 86 S.Ct. 1826, (June 20, 1966). If it was that brand of pornography which Justice Stewart defined and describes in subjective terms as "I know it when I see it" or that type which several jurists have called "obscene per se,"[27] the film could be said to

[27]The test for obscenity *per se* is stated in *Morris v. United States*, 257 A.2d 341 (Dec. 2, 1969):

> "If reasonable men could not differ and they could come to but one conclusion, i.e., that the material or performance is sexually morbid, grossly perverse, and bizarre, without any artistic or scientific purpose or justification, then the Government on its case in chief need not offer any evidence of national community standards."

See also *Wilhoit v. U.S.*, 279 A.2d 505, cert. den. 30 L.Ed.2d 546 (Dec. 14, 1971) (Douglas would grant cert. and set the case for argument); *Mitchum v. State of Florida*, 251 S.2d 298 at 301 (Aug. 12, 1971); *U.S. v. Womack*, 111 U.S. App. D.C. 8, 294 F.2d 204, cert. den. 365 U.S. 859, 81 S.Ct. 826, 5 L.Ed.2d 822 (Mar. 27, 1969); *U.S. v. Wild*, 422 F.2d 34 (Oct. 29, 1969), cert. den. 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed.2d 152, re-hrg. den. 403 U.S. 940, 91 S.Ct. 2242, 29 L.Ed.2d 720 (June 21, 1971); *Mitchum v. State of Florida* 244 S.2d 159, 160 (Jan. 26, 1971); *Collins v. State Beverage Dept.*, 239 S.2d 613, 616; *Marks v. State of Florida*, 262 S.2d 479 (May 23, 1972); *Kaplan v. U.S.*, 277 A.2d 477 at 479 (May 23, 1971); *Illinois v. Ridens*, 282 N.E.2d 691 at 695 (Mar. 21, 1972); *State of Minn. v. Getman*, 195 N.W.2d 827 at 829 (Mar. 17, 1972); Justice Herndon dissenting in *Harmer v. Tonylyn Productions*, 100 Cal. Rptr. 576, 579 (Mar. 2, 1972); *United Theatres of Florida v. State ex rel Gerstein*, 259 S.2d 210, 212 (Feb. 15, 1972); *U.S. v. Miller*, 455 F.2d 899 at 902 (Mar. 22, 1972). See also Justice Sullivan speaking in *Boreta Enterprises, Inc. v. Dept. of Alcohol Beverage Control*, 2 Cal. 3d 85, 84 Cal. Rptr. 113, at 123 (Feb. 26, 1970).

In view of New York Penal Law 410.00,(9), it would appear that "Blue Movie" is indisputably "obscene per se."

be at one end of the obscenity spectrum; if it is of a less offensive nature, the autoptical evidence may not speak so loudly, and the film would be somewhere else along the spectrum. To the extent that the capacity of the person evaluating the film may be in issue, Petitioner erroneously assumes that a peace officer, Assistant District Attorney, and a Judge are relegated to a classification which is incapable of making a value judgment in the entire spectrum of such potential evidence,[28] which will satisfy the test enunciated in *Roth v. U.S.*, 354 U.S. 476. The argument which Petitioner urges herein was recently made to the Ohio Su-

[28]On that matter, there is nothing inherently wrong with a state policy which authorizes a peace officer to make a warrantless arrest for obscenity so long as the procedural law permits a person so arrested to contest the "probable cause" determination either in an ancillary proceeding in the criminal prosecution or in a separate civil action. The case for the police officer was also stated by Common Pleas Judge Pryatel in *Ohio v. Dornblaser*, 267 N.W.2d 434 (Mar. 8, 1971), at 438:

> "Upon review of the authorities, we cast our lot with those who hold that the requirement to conduct adversary hearings on 'obscene' films offered for sale before an arrest or prosecution can be effected is unnecessary and that the absence of such a hearing affects neither the validity nor the legality of the arrest or the indictment that followed.
>
> "To hold that the seller, of the films sought to be suppressed here, should be accorded adversary proceedings before arrest and indictment can be accomplished is to scoff at our obscenity laws and the public they were passed to protect. Nor do we believe that the First and Fourteenth Amendments of the Constitution need be construed to forge a ring of protection around such purveyors of pornography. We see no constitutional reason why these 'salesmen' should be given the consideration of prior adversary hearings for we find no abridgement of their rights or privileges by such denial. It is our opinion that the law should not erect another barrier for the police to hurdle in their already difficult responsibility to curb obscenity and that these purveyors should not be given a prior hearing to ascertain whether their product is sufficiently hard-core pornography to warrant prosecution. Therefore, the Motion to Suppress for lack of prior adversary hearing is overruled."

preme Court and rejected in *Ohio v. Albini, supra,* where Justice Herbert, speaking for six of the Ohio Supreme Court Justices, said as to that proposition:

> "The adoption of appellant Albini's contention in this regard would emasculate the efforts of the General Assembly to discourage those who would profiteer through the commercial exploitation of sex by publicly exhibiting motion picture film, the dominant theme of which appeals to a prurient interest in sex . . . ."

In a footnote at page 28, the Court noted:

> "2. Essentially, it appears to be the contention of counsel for appellants that two trials, each with a full right of appeal, are required for final conviction of an offense of this nature, regardless of whether the facts would otherwise constitute obvious proof of guilt; first, a hearing to determine whether the officer may be permitted to make an arrest, file charges and take physical custody of the obscene material for evidentiary purposes and, second, the criminal trial itself. In response to a question posed during oral argument of this cause, appellant's counsel estimated that a final adjudication of the first hearing in cases such as the one at bar would require at least two years. Moreover, just how the physical evidence could be adduced at this first hearing without prior 'seizure' thereof is not clear since we cannot assume that a potential criminal defendant would freely volunteer to supply such. . . ."

*(b) Deputy Inspector Smyth Was Entitled To Rely Upon The Legal Counsel of the District Attorney Who Attended The Movie on July 30, 1969.*

Independent of the issue re the capacity of a peace offi-

cer (in this case, the Deputy Inspector) to make value judgment of his own as to obscenity crimes, the record demonstrates that other "facts and circumstances within the arresting officer's knowledge and of which he had reasonable trustworthy information . . . existed which were sufficient to warrant a man of reasonable caution in the belief that an offense had been committed." *Draper v.* U.S., *supra.* In the case herein, Assistant District Attorney Beckler viewed the film on the day preceding the viewing by Judge Goldberg, and it was at his request that Judge Goldberg appeared at the Garrick Theater. (See Statement of the Case, page 61.

*(c) Petitioner Having Failed To Attack The Arrest Warrant Is Precluded From Denying That "Probable Cause" For The Arrest Existed.*

During arguments on the motion to dismiss, following the completion of plaintiff's case in chief, the Presiding Judge noted that the defendant had failed to attack the arrest warrant which, under Amicus' view of the case is the real basis for the seizure and the vital issue herein. In the transcript of proceedings the following colloquy took place at page 49a:

The Presiding Judge: "Wait a minute, you never attacked the warrant unless now – –"

The Defendant's Counsel: "I don't believe I have to attack the warrant."

Having failed to present arguments on that issue, he is now precluded from denying that "probable cause" existed.

**B. Petitioner Was Not Deprived of Due Process When The Positive Print Used by Petitioner to Project The Audio Sound and Visual Images Was Seized Incident to the Arrest as Evidence Bearing on the Charge.**

**1. Legitimate Interests of Society Require That The Autoptical Evidence Used To Project the Audio Sound and Visual Images On the Screen Be Preserved Against Alteration or Destruction.**

Society has a legitimate interest in suppressing crime and detecting criminals which requires (1) that evidence of the crime, namely, the motion picture projection print, be preserved against alteration or destruction; (2) that the motion picture projection print, as autoptical evidence, be favored over the testimonial evidence of law enforcement as to what was seen and heard, inasmuch as faulty judgment resulting from disability in one or more of the senses, may draw in question the integrity of the later, and (3) that the deterrent effect of the criminal laws, which attends public recognition of a peace officer's right to take *immediate* possession of the instrumentality of crime (the motion picture projection print) as evidence, should be given great weight in evaluating defensive tactics which frivolously draw that right in question. In a parallel consideration in *Breithaupt v. Abram*, 352 U.S. 432, 439, 1 L.Ed.2d 448, 453, 77 S.Ct. 409 (Feb. 25, 1957), this Court, in affirming the right of state authorities to extract blood in a warrantless seizure from an unconscious person so as to prove him under the influence of alcohol and responsible for an auto accident, held:

> "As *against the right of an individual* that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test of the kind

to which millions of Americans submit as a matter of course nearly every day, *must be set the interests of society in the scientific determination of intoxication.* one of the great causes of the mortal hazards of the road. *And the more so since the test likewise may establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses. Furthermore,* since our criminal law is to no small extent justified by the assumption of deterrence, *the individual's right* to immunity from such invasion of the body as is involved in a properly safeguarded blood test *is far outweighed by the value of its deterrent effect due to public realization that the issue* of driving while under the influence of alcohol *can often by this method be taken out of the confusion of conflicting contentions.*" (Emphasis ours.)

*(a) The Emergent Condition Requires That The Alleged Instrumentality Of The Crime Be Preserved In Its Challenged Form.*

The same emergent condition that was said to exist at the time of the arrest and seizure of a blood sample in *Schmerber v. Calif.*, 384 U.S. 757, 16 L.Ed.2d 908, 919, 86 S.Ct. 1826 (June 20, 1966) presents itself as to evidence in the form of a motion picture projection print when there is an arrest for the exhibition of an obscene film.

It has been said that the film itself is "indispensable evidence." "Indispensable evidence is that without which a particular fact cannot be proved," Witkin, California Evidence, Copyright 1958, at page 5. It is a well known fact that sexually oriented motion picture films are often altered

by adding or deleting scenes.[29] The absolute necessity of retaining an exact copy of the content of the film as shown at the time of the commission of the alleged offense is obvious. To require that the film be brought into court or that arrangements be made for a private showing provides no guarantee against cutting or alteration in the interim.[30]

To instruct a state that its police officers or prosecutors, after viewing an obscene film, may not make an immediate arrest, but must leave the theatre and report its contents to

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[29]See the remarks of the Presiding Judge Trial Judge Muldow on this issue in Transcript of Proceedings, pages 57a-58a, appearing in Statement of the Case at page 67.

"In *Cambist Films, Inc. v. Duggan*, 298 F.Supp. 1148, 1152, footnote 4 (W.D. Pa.) (Apr. 28, 1969), Federal District Judge Dumbauld pointed to the need for the immediate preservation of evidence:

> "The retention of one print as evidence is reasonable and not oppressive. In view of the fact that the film itself is perhaps the best evidence, or at least indispensable evidence, on the question as to its nature, and of the fact that films are often cut or altered for showing at different theatres, it is important to establish the exact content of the film as exhibited on the occasion giving rise to the prosecution . . . ."

[30]During 1970, Amicus and others assisted the City of Atlanta in a civil action asking for an injunction against the film, "Sandra, the Making of a Woman." On Oct. 16, 1970, the film was viewed by Atlanta, Georgia, law enforcement and on Oct. 21, 1970, a court order was issued and served on the theater, requiring them to bring the film before the court. When the film was finally produced on Nov. 6, 1970, another version was tendered to the court. At least 500 feet had been cut from one of the scenes (5 min.), as was later proved to the court, using a film continuity, the still photographs of which had been taken by law enforcement on Oct. 16, 1970. An attempt, thru depositions, to pin down the responsibility for the cutting was unsuccessful. The trial court finding that the film was obscene was affirmed by the Georgia Supreme Court. The matter did not go beyond the Georgia Supreme Court. Were this Court to uphold the claim of Petitioner herein, the already difficult task of getting an obscenity case to trial would be further complicated by an additional issue: "Which film was shown on the date in question?"

a judicial officer, would completely frustrate the state's legitimate right to prohibit the public showing of obscene films.[31]

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[31]See the Colorado experience with the film "Animal Lover" at footnote 7. In *Hosey v. City of Jackson*, 309 F. Supp. 527, 534, 535 (S.D.Miss., Jackson Div.) (Jan. 22, 1970) Federal District Judge Nixon, speaking for the majority of a three-judge Federal District Court, analyzed the social needs in the light of the evidentiary problems present in such cases:

> "The film itself is unquestionably the best evidence in any criminal prosecution for the public showing of an obscene movie. More importantly, however, it is a well known fact that moving picture films may be and often are altered by adding or deleting one or more scenes for showing at a particular theater or exhibition. The absolute necessity of retaining an exact content of the film as shown at the time of the alleged offense is obvious. . . .
>
> "This Court is of the opinion that any judicial hearing prior to the seizure of an allegedly obscene film at the time of exhibition would completely frustrate the purpose and operation of the Mississippi statute prohibiting the exhibition of obscene movies. Certainly, if a prior judicial hearing were required, it would be necessary for the hearing judge to view the film as exhibited on the occasion giving rise to the prosecution. To require a judge to proceed from one theater to another or attend numerous showings of a film at a particular theater with the mere possibility of viewing an obscene version is untenable. Furthermore, to require that the film be brought into Court or that arrangements be made for a private showing of the film in a particular theater provides no guarantees against the cutting or alteration of the film prior thereof. Finally, if police officers, after viewing an obscene film, were required to leave the theater in order to obtain a judicial determination on the question of obscenity by merely reporting the contents to the proper judicial officer, a judicial determination under such conditions would not only be extremely difficult and subject to error, but by the time a seizure could be made, the film might be altered or even shipped to another theater or location. This would be particularly true in so-called 'quickie movies' or 'premiere performances,' the same or any versions of which might never again be shown at the same location. A procedure which is not unreasonable and not oppressive should not be condemned so as to completely frustrate a state's legitimate right to prohibit the public showing of obscene movies.

(This footnote is continued on the next page)

How else may the state obtain the indispensable evidence?[32] In most cases, the state cannot purchase a copy of the film to be used in evidence. Even were this possible, it would be an almost insurmountable task to prove at the trial that the purchased copy is identical to the one which is named as being the instrumentality of the crime.

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"The necessity of the seizure of an obscene movie at the time of showing cannot be compared to the seizure of obscene literature because books or magazines can always be bought and purchased before a court for a judicial hearing before a seizure is accomplished. Furthermore, literature does not enjoy the same possibility of easy deletion and alteration as is the case with a motion picture. Several movements of the cutter's hand can completely change the content of an exhibited obscene version of a movie and thereby eliminate any successful criminal prosecution."

[32]In *Bazzell v. Gibbens*, 306 F. Supp. 1057, (E.D. Louisiana, Baton Rouge Division) (Dec. 9, 1969), Chief Judge West made the following observations as to the interests of society in such matters, at page 1060:

"To deprive the District Attorney or the State of Louisiana of the right to seize evidence pursuant to a search warrant issued on the basis of probable cause, and to preserve that evidence intact for use during future criminal proceedings, would be to effectively deny the state the right in a case such as this to prosecute at all under a statute already declared to be constitutional . . . ."

and at page 1061:

"The State could not purchase a copy of the film to be used as evidence as it could in the case of most printed publications. It is absolutely necessary for the State to have a copy of the film in order to properly enforce the statute involved. How else but by seizure could it obtain this indispensable evidence? . . . . It would make no difference insofar as First Amendment rights are concerned whether the possession of such evidence is obtained by the State by virtue of a seizure made pursuant to a search warrant properly issued or by virtue of a court order directing the defendant to deliver the film to the State so that it might be used in preparation for trial. In either case the purpose of the possession of the film by the State is to preserve the minimum amount of evidence required to properly prepare the State's case rather than to prohibit the further dissemination of the information contained in the film prior to trial."

If this Court were to make an exception and, where motion picture films are concerned, limit the right of law enforcement to seize the instrumentality of the crime at the time of arrest, it would be opening another Pandora's Box and inviting another long line of litigation similar to the last 4 years involving the adversary hearing, which followed *Lee Arts Theatre, Inc. v. Virginia*, 392 U.S. 636. In discharging its duty to "preserve" evidence, law enforcement rarely finds itself faced with identical fact situations.[33] If this Court

[33]In discharging its duty to "preserve evidence, law enforcement often finds itself faced with fact situations which are "just a little different." In *California v. DeRenzy*, 79 Cal. Rptr. 777, 781 (Aug. 1, 1969), hearing denied by the California Supreme Court on Sept. 24, 1969, Justice Elkington of the Court of Appeal, First District, Div. 1, pointed out some of the unusual problems which will be affected by this Court's ruling herein:

> "De Renzy's argument in the Superior Court, not emphasized here, that the police nevertheless conducted a mass seizure since they took both non-obscene and obscene material on the same reels, is obviously without merit. Any police attempt, at the place of seizure, to edit and cut hundreds, perhaps thousands, of feet of film without expertise or proper equipment, would be a far greater threat to constitutional and property rights, than was the conduct complained of here . . . . DeRenzy has mentioned, without particularly advocating, the sometimes suggestion that in the absence of an adversary hearing, a magistrate should at least view allegedly obscene film before authorizing a search warrant. No way has yet been pointed out how this is to be accomplished. Must the magistrate at the beck of a policeman travel to the place of exhibition? If so, should the visit be clandestine or open? The former would be unfitting; a judge should not assume the role of an undercover investigator. If the magistrate makes his presence known, what reasonable assurance exists that the exhibitor will show the film, thus perhaps aiding in his own conviction. No means appear by which he may be compelled to bring his film to the magistrate. And even if such a viewing could be arranged before seizure of the film, there would still be no prior adversary hearing as demanded here by DeRenzy, and required, *in proper cases*, by *Books, Marcus and Metzger*. (Their Italics.)

In upholding the seizure of two films taken under an *ex parte* search warrant in *New York v. Steinberg*, 304 N.Y.S.2d 858 (Oct.

(This footnote is continued on the next page)

fashions a new rule, it must then be prepared to sit in judgment on the refinements to the new rule.

The "chilling effect" so easily claimed by defense counsel, is more often than not, imaginary. To honor such arguments in a challenge to the public interest which entrusts a peace officer with the right to take immediate possession of the instrumentalities of alleged crimes, when it is clear that no supportive facts exist therefor, undermines the operations of the criminal law.[34]

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2, 1969), Judge Pollack made the following observations on the problems which attend the marshalling of evidence in motion picture obscenity cases in New York City:

"The state is entitled to prosecute people who exhibit motion pictures which are obscene. In order to prosecute for obscenity they must first seize the films since the best evidence of whether the picture is obscene or not is the picture itself.

"Before the films were seized, Judge Burchell and Judge Wein, at the request of the District Attorney, viewed all the films and trailers at regularly scheduled performances in the Capitol Theatre and then signed the search warrants . . . .

"This is not a massive seizure of books, but a seizure of motion pictures. In the Court's opinion it is less practicable to hold a preliminary judicial adversary proceeding in a case involving motion pictures than in a case involving books. To require a full adversary judicial proceeding prior to the seizure would be unreasonable, and in many cases impractical since by the time a hearing could be arranged after due notice to the potential defendant the film might no longer be in the possession of the potential defendant."

[34]In *U.S. v. Pryba, Herman L. Womack, Potomac News Co.*, 312 F. Supp. 466, 468 (Dist. of Columbia) (Apr. 2, 1970), Federal District Judge Pratt, in evaluating such defense tactics where an affidavit alleged "the films depict a man and a female engaged in sexual intercourse, and various sexual activities by males and males, and males and females," made the following comments:

"Additionally, none of the cases cited by defendants address themselves to the impracticality, not to say impossibility, of holding a prior adversary hearing in the situation at bar where obscene materials surreptitiously placed in the stream of interstate commerce are fortuitously discovered by a civilian employee. In such circumstances, officers, after

*(b) Autoptical Evidence (the Motion Picture Projection Print) Is To Be Favored Over Testimonial Evidence of Peace Officers As To What They Saw or Heard Exhibited On The Motion Picture Screen.*

At least one other jurisdiction has specifically ruled that motion picture films constitute "writings" which, under the California Evidence code, require their production at the

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the parcel has been repacked, sent on its way; and traced to its destination, should not be required to make the futile gesture of requesting that copies be made available for viewing by a judicial officer prior to the institution of criminal proceedings. That a defendant would cooperate voluntarily is unlikely particularly in a case where hard-core obscenity is involved. Moreover, to believe that the same films would be proffered to the court in the same condition as when first viewed by the employee is to blink reality. To require the prosecution to institute civil proceedings or to issue a subpoena duces tecum would be equally impractical and would render the enforcement of 18 U.S.C. § 1462 virtually impossible. Defendants have suggested no practical method whereby a prior adversary hearing in the instant case could have been achieved.

"Finally, the minimal public deprivation and any chilling effect on the exercise by defendants of constitutionally protected rights were diminished by the Government's proffer of an adversary hearing on the issue of obscenity attempted to be held only five days after the seizure. Had these materials been non-obscene, such a determination could have been promptly made following the seizures and the materials returned to defendants for such public or private display as they desired. Defendants waived the opportunity to participate in this hearing, however, and with it gave up the opportunity immediately to require the prosecution to demonstrate that these materials were obscene and therefore unfit for public consumption. The apparent nature of the films involved supplies convincing reasons for the Defendants' disinterest in having such a hearing.

"In short, we hold that an adversary hearing on the issue of obscenity prior to seizure was not required under the facts of this case."

trial under the "Best Evidence" rule.[35] In *California v. Enskat*, 98 Cal. Rptr. 646, 647, 20 Cal. App.3d, Supp. 1 (Sept. 21, 1971) the Appellate Department ruled that a proper foundation must be laid before secondary evidence would be admitted.[36] In *California v. Goulet*, 98 Cal. Rptr. 782, 783, 21 Cal. App.3d Supp. 1 (Dec. 7, 1971), that same Court recognized, in applying the best evidence rule in a motion picture obscenity case that, in some cases, secondary evidence

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[35]The rationale behind the "Best Evidence" rule is stated in Model Code of Evidence, American Law Institute, Rule 602. Comment at page 300 to be: (See also McCormick on Evidence (1954) at page 410; 4 Wigmore on Evidence (3rd Edition, 1940, Section 1179):

> "Slight differences in written words or other symbols may make vast differences in meaning; there is great danger of inaccurate observation of such symbols, especially if they are substantially similar to the eye. Consequently there is opportunity for fraud and likelihood of mistake in proof of the content of a writing unless the writing itself is produced. Hence it should be produced if available."

[36]In *Enskat*, the Appellate Department held as follows:

> "That there appears to be a 'motion picture' does not alter the fact that a series of single pictures on the film strip, each one a 'writing' is casting an image on the screen.
>
> "Respondent argues, however, that it is not the film, but these light images on the screen, that constitute the offense of exhibiting an obscene motion picture. Respondent argues that as this moving image is unrecorded, it cannot be a writing, and therefore is not subject to the best evidence rule. This argument ignores the essential fact that the moving image is merely the consequence of casting a writing (the film) through a machine. Without the projector and the filmstrip, no moving image is cast at all. The contents of the moving image, 'evanescent' or not, is totally dependent upon the content of the filmstrip. Just as it is better for the trier of fact to read a document than have it described, it is better for the trier of fact to see a movie than have it described. The policy considerations upholding the rule for written documents apply with full force to movies as well. . . ."

may be insufficient on its face and require its rejection.[37]

The indispensable nature of such autoptical evidence, being the very instrumentality of the crime, is obvious. In a number of cases it has been shown that, unless such evidence is preserved, the prosecution may fail. See *Bryers v. Texas*, 480 S.W. 2d 712 (May 31, 1972) where the Court reversed an obscenity conviction based upon testimonial evidence only, saying at 718:

> "In conclusion we hold that the evidence is insufficient to sustain an obscenity conviction unless (1) the obscene matter, in this case a film, is introduced into evidence, or (2) the defendant expressly and affirmatively stipulates or admits that the material is obscene under the standards stated in Article 527, Section (A)."

In *Longoria v. Texas*, 479 S.W.2d 689 (Feb. 16, 1972) a jury

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[37] In *Goulet*, The Appellate Department ruled:

> "We return to the major ground of dismissal, that the film in question must be available as evidence, and that verbal description of the contents (or 'secondary evidence') is not admissible. Although this appears to be a case of first impression in this state in the obscenity area, the use of secondary evidence in criminal cases generally has long been recognized (People v. Rial (1914), 23 Cal. App. 713, 139 P. 661; People v. Chapman (1921), 55 Cal. App. 192, 203 P. 126; People v. Powell (1925) 71 Cal. App. 500, 236 P. 311). Such case is also expressly recognized in new Evidence Code (Section 1503) subsection (a).
>
> "To be sure, there may be cases where it is difficult to establish the contents of a film or book by oral secondary showings, particularly where its obscenity may be borderline in character. There may also be cases where the secondary showing may be insufficient on its face and require a court to reject it in its entirety. But we do not reach issues as to the sufficiency of the secondary evidence offered, the sufficiency of the foundation laid for its admission, or the extent to which any common law basis for the use of secondary evidence has been expanded or contracted by the Evidence Code . . . ."

assessed a fine of $1,000.00 and six months in jail for exhibiting four films in Corpus Christi, Texas. At the trial two police officers described several scenes from the films. which showed nude bodies of men and women, acts of sexual intercourse, acts of oral sodomy, other sexual activity and a limited amount of conversation. Neither the films nor any portions or representations of them were introduced into evidence. The Court of Criminal Appeals of Texas reversed the testimony of the officers describing the motion pictures was insufficient evidence for the jury, or the Appellate Court, independently, to determine obscenity. In *Longoria v. Texas*, the Court noted that in *Brown v. State of Texas*, 167 Tex. C.R. 351, 320 S.W.2d 670, a verdict by a jury which had seen the film was reversed on appeal where the record contained nothing to show what the jury saw and what the evidence was.

Amicus submits that to prohibit the seizure of autoptical evidence at the time of the arrest would be contrary to general principles of the law which prefer its use – more so, when such is also the very instrumentality of the crime. To do so would impede the marshalling of the most trustworthy, if not indispensable evidence, and would generally frustrate criminal prosecutions.[38] (See footnotes 7, 8 and 10.) In this regard Federal District Judge Nixon, writing for the majority

[38] Suppose a case in which reliable information establishes that an adult male has exhibited "photographs and books (entitled 'Guidebook To Sexual Positions Between Consenting Adult Males by J. J. Proferes') with pictures of nude men performing sodomy and unnatural and perverted sex acts" to a 13-year old boy, immediately after which he performed an act of oral sodomy on the 13-year old, would the police be authorized to seize the book as evidence of the crime, either under a search warrant or incident to his arrest at his home, or would they first have to afford him an adversary hearing? See *Hughes v. Maryland*, 287 A.2d 299, 308 (Feb. 16, 1972). If not there, why then here?

in *Hosey v. City of Jackson*, 309 F. Supp. 527 at 534, footnote 9 (Jan. 22, 1970), vacated and remanded on jurisdiction in 401 U.S. 987, 28 L.Ed.2d 525, 91 S.Ct. 1221, noted as follows:

> "The right and even the duty of police officers to seize the evidence which was the very means or vehicle of the commission of a crime committed in the officer's presence is not, in this court's opinion, affected by the holding in Chimel. To prohibit the seizure of such evidence under these circumstances would completely frustrate criminal prosecution, and necessarily the arrest for a crime witnessed by the arresting officers . . . ."

**(2) The Seizure Incident To The Arrest Was Within The Reach Authorized by CHIMEL v CALIFORNIA.**

Searches incident to lawful arrest are justified in order to prevent the alteration or destruction of evidence of the crime. In *Preston v. U.S.*, 376 U.S. 364, 367, 11 L.Ed.2d 777, 780, 84 S.Ct. 881 (Feb. 25, 1954) this Court noted:

> "The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, *as well as by the need to prevent the destruction of evidence of the crime – things which might easily happen where the weapon or evidence is on the accused person or under his immediate control.*" (Our emphasis.)

See also *Chimel v. Calif.*, 395 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034 (June 23, 1969), where this Court said at page 694:

> "When an arrest is made . . . it is entirely reason-

able for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab . . . evidentiary items must, of course, be governed by a like rule . . . . *There is ample justification, therefore, for a search of arrestee's person and the area within his immediate control – construing that phrase to mean the area from within which he might gain possession of . . . destructible evidence . . . .*" (Our emphasis.)

It is clear that the search of the projection booth incident to the projectionist's arrest was within the reach authorized by *Chimel v. California, supra.* The projectionist was in the booth from which the audio and visual projections originated, and at the time he was arrested was himself in possession of the motion picture film which was seized. See Statement of the Case at page 63.

Further, it is not a "search" where an officer observes contraband which is clearly visible from a place where an officer has a right to be. *New York v. Finkelstein,* 28 Misc. 2d 771, 218 N.Y.S.2d 341, *New York v. Matherson,* 16 N.Y. 2d 509 (Apr. 22, 1965). A search warrant is not necessary, where the object sought by search is visible, open and obvious to anyone within reasonable distance, employing his eyes. *New York v. McKendall,* 30 App. Div.2d 717, 290 N.Y. S.2d 987.

Granted the law's preference for search warrants, a state is not required to resolve all such issues on the practicabil- of obtaining a search warrant. A state is entitled to rely on this Court's express invitation to develop workable rules, governing arrests and searches, based on the principle of reasonableness under all the circumstances of the case.

*Ker v. Calif.*, 374 U.S. 23, 33-34, 10 L.Ed.2d 726, 83 S.Ct. 1623.

There is nothing inherently wrong with a state policy which authorizes a peace officer to make a seizure incident to a warrant or warrantless arrest for obscenity so long as the procedural law permits a person so arrested to contest the "probable cause" determination either in an ancillary proceeding in the criminal prosecution or in a separate civil action.[39] See also the dissent of Justice White in *Chimel v. Calif.*, 395 U.S. 752, 781-783, 23 L.Ed.2d 685, 89 S.Ct. 2034, 2051-2052, wherein he noted that, "In considering

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[39]Petitioner did not move to regain possession of the film either as an ancillary matter in the criminal proceedings or by separate civil lawsuit. Amicus questions whether Petitioner may now press a First Amendment claim based upon unreasonable previous restraint. See *Johnson v. Common. of Kentucky*, 475 S.W.2d 893, 894 (Dec. 17, 1971), where the Kentucky Court of Appeals said: "Since no such step was taken in the present case, this Court is of the view that these appellants may not now complain that the state authorities retained possession of the film, since they never sought a judicial order for the return of that material. . . ." Not every previous restraint is unlawful. *U.S. v. 37 Photographs*, 402 U.S. 363, 374, 28 L.Ed.2d 822, 833, 91 S.Ct. 2221 (May 3, 1971).

Forty-eight days elapsed between the time that Deputy Inspector Smyth arrested the Petitioner and seized the film "Blue Movie" as the instrumentality of the crime and the return of the verdict that the film was obscene and that Petitioner had knowledge of the obscenity thereof when he exhibited the same. Such restraint as occurred here was clearly within the guidelines set down by this Court in *U.S. v. 37 Photographs*, *supra*, at 832:

> "Given this record, it seems clear that no undue hardship will be imposed upon the Government and the lower federal courts by requiring that forfeiture proceedings be commenced within 14 days and completed within 60 days of their commencement; nor does a delay of as much as 74 days seem undue for importers engaged in the lengthy process of bringing goods into this country from abroad. Accordingly, we construe § 1305(a) to require intervals of no more than 14 days from seizure of the goods to the institution of judicial proceedings for their forfeiture and no longer than 60 days from the filing of the action to final decision in the district court . . . .

searches incident to arrest, it must be remembered there will be immediate opportunity to challenge the probable cause for the search in an adversary proceeding. The suspect has been apprised of the search . . . and having been arrested, he will soon be brought into contact with people who can explain his rights . . . . An arrested man, by definition conscious of the police interest in him, and provided almost immediately with a lawyer and a judge, is in an excellent position to dispute the reasonableness of his arrest and contemporaneous search in a full adversary proceeding." Justice Stewart's response to Justice White in *Chimel* at footnote 7 that, "one may initially question whether all of the states in fact provide the speedy suppression procedures the dissent assumes. . . ." provides no satisfactory answer for those states that do. (See footnote 26.) This Court should bear in mind the very real interest the State of New York and other states have in suppressing obscenity and maintaining high moral standards. On the strong legislative policy of the State of New York against obscenity, see Point I A 1, at page 99.

**C. Petitioner Was Not Deprived of Due Process When The Positive Film Print Was Admitted Into Evidence at The Trial.**

By waiving a pretrial motion to restore the film print and

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"Of course, we do not now decide that these are the only constitutionally permissible time limits. *We note furthermore, that constitutionally permissible limits may vary in contexts, such as a claim by a state censor that a movie is obscene,* the Constitution may impose different requirements with respect to the time between the making of the claim and the institution of judicial proceedings or between their commencement and completion than in the context of a claim of obscenity made by customs officials at the border. We decide none of these questions today." (Our emphasis.)

the preliminary hearing (see Statement of the Case at page ) Petitioner is now foreclosed from arguing First Amendment principles.

It is clear from the foregoing principles and authorities that the public policy requires that the positive film print which was used to project the images and sound, being the instrumentality of the alleged crime, be preserved intact and introduced as evidence for the consideration of the trier of fact in its determination on the issue of guilt or innocence. Whether as "best evidence" or as "indispensable evidence" the search for objective truth requires that law enforcement investigators ferret out and preserve the same so that the law may be honestly administered. In Elements of Police Science, copyright 1942, Foundation Press, Inc., Professor Rollin Perkins comments on the duties and responsibility of law enforcement investigators in such matters, at pages 44 and 50:

> "It is impossible to give all of the rules for conducting every variety of investigation which the police are called upon to make, but there are some rules which have general application. They are . . . 21. A search must be made for all clues to aid in establishing the fact that a crime has or has not been committed, as for evidence which will not only prove useful in iden-
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> well as for evidence which will not only prove useful in identifying and convicting the perpetrator, *but also aid in eliminating innocent suspects* . . . 25. During the progress of the general survey, *everything must be observed with maximum attention.* A *Chinese saying, 'The eyes see only what they look for, and look for what is already in the mind,'* is particularly applicable in the field of investigation . . . 26 . . . . In an important case

recently tried, the omission of these details and *the non-observance of important evidence almost resulted in the execution of an innocent person.* . . 36. All movable evidence must be carefully wrapped or placed in suitable containers, sealed, and marked with the identification symbol with the following notations thereon: The place from whence taken, the date and time, the names of witnesses to the act, the name and number of the report, and the name of the person who removed the evidence . . . 37. Every article taken must be handled and packed so that all characteristics will be preserved from the moment of collection until presented to the expert for examination or introduced by the investigator at the trial. *All evidence must when presented in court show a complete chain of its custody from the time it was first taken into possession until presented as evidence. The courts have continuously held that evidence must be identified with the place of discovery, that it be uncontaminated, and unchanged in character. . . .*" (Our emphasis.)

The Prosecution fully complied with all of the requirements of the law. During its case in chief, the District Attorney offered in evidence the positive film print which was seized, and showed a complete chain of its custody from the time it was first taken into the possession of Deputy Inspector Smyth at the time of the arrest until received in evidence as Exhibits 1 (see Statement of the Case at page 63.

**D. The Past Decisions Of This Court Do Not Support Petitioner's Claim That The Denial Of An Adversary Hearing Prior To A Seizure Which Is Incident To Arrest Amounts To The Deprivation Of A Fundamental Constitutional Right.**

Until this Court's *per curiam* reversals in May and June of 1967, the defense attorneys lacked the courage to advance the arguments now made herein – i.e., that the failure to have an adversary hearing on the issue of the obscenity of a film, prior to arrest and seizure, amounts to a denial of due process. For an example of the standard defense tactic used prior to that time, see *Schackman v. Arnebergh*, 258 F. Supp. 983 (Sept. 27, 1966) wherein one of the defendants in *Schackman v. Calif.* brought a *collateral civil action in the federal district court* seeking a declartory judgment that the films involved in the state criminal prosecution (D-15, 0-7, 0-12) were not obscene and asking for an injunction against enforcement of the California Statute. The aura of respectability given to such materials by the 1967 reversals and this Court's summary reversal of the criminal conviction in *Lee Art Theatre v. Virginia*, 392 U.S. 636, 20 L.Ed.2d 1313, 88 S.Ct. 2103 (June 17, 1968),[40] was to change all this and, in opening Pandora's Box, set

[40]The *Lee Art Theatre* case was decided on the last day of the 1967 October Term and without benefit of briefing on the merits or oral argument. The petition therein, *Lee Art Theatre, Inc. v. Virginia*, No. 977, October Term 1967, shows that the central issue was the seizure of the two films under the search warrant. The facts did not include the issue of a seizure incident to an arrest. The very substantial difference between *Lee Art Theatre* and the case herein is apparent. See Whiteley v. Warden of Wyoming State Penitentiary, 401 U.S. 560, 566, 28 L.Ed.2d 306, 312, 91 S.Ct. 1031 (Mar. 29, 1971). Here there was no search – the seizure of the film whose presence was obvious to everyone being incident to the arrest.

free a can of worms which has been plaguing law enforcement for four years.

Petitioner objects to the seizure of the motion picture film "Blue Movie" viewing obscenity as a unique area, requiring special treatment. Such arguments are drawn out of context from language of certain members of this Court in *Marcus v. Kansas City Search Warrants*, 367 U.S. 71 (1961), and *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964) and subsequent lower court decisions which, in misapplying such language, erroneously hold that a judicial determination of obscenity in an adversary proceedings is constitutionally required before a motion picture film may be seized as evidence for a criminal prosecution.

The *Quantity of Books* case concerned not a criminal prosecution, but an auxiliary means of attacking obscene materials – *civil suppression of all copies* through injunction, a form of relief given limited approval in *Kingsley Book, Inc. v. Brown*, 354 U.S. 436. Such injunction statutes are not always surrounded by the due process safeguards which automatically attend criminal prosecutions. *Quantity of Books* was, therefore, an example of a civil procedure presenting the problem (as four members of the court saw it) of unconstitutional prior restraint. In *Quantity of Books*, it was the civil process which was imperfect, and that decision sought only to bring the civil procedure up to the level of the criminal process. It did not declare that the regular criminal procedures were outmoded.

The *seizure of all copies* as in *Quantity of Books*, pursuant to injunction may impinge directly on the *First Amendment*, whereas a seizure of a single copy, as evidence antecedent to a criminal prosecution, is cognizable under the *Fourth Amendment*. Civil remedies proceed directly against

a publication, the sole issue being the nature of the publication; in the criminal proceedings, however, the issue is not suppression of books, but whether the defendant, by his conduct has committed a crime. Probable cause that he has committed a crime serves to bring him to trial, the seizure of publications becoming a gathering of evidence of the defendant's actions, and being purely incident to the arrest.

Misunderstandings placed upon the *A Quantity of Books* decision, stemming from a failure to distinguish its prior restraint civil aspects from criminal cases involving a seizure to obtain evidence for a criminal prosecution, have brought about a rash of bad law and chaos in this area of law.

Unfortunately, one of the first and best cases in this contentious area of the law went unreported for 14 months. See *East Village Other, Inc. v. Koota*, finally reported in 305 F. Supp. 1159 (Feb. 13, 1968). In his opinion at page 1162, Judge Dooling correctly interpreted *Marcus v. Kansas City Search Warrants*, 367 U.S. 717 (1961); *A Quantity of Books, v. Kansas*, 378 U.S. 205 (1964), and *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), and their relationship to the lower court obscenity decisions of *Potwora v. Dillon*, (CA2), 386 F.2d 74 (Nov. 14, 1967), and *Evergreen Review, Inc. v. Cahn* (EDNY 1964), 230 F. Supp. 498, which were the leading federal cases on mass seizures at the time of Judge Dooling's decision.

The subsequent decisions were to lose themselves in the confusion flowing from the language in the *Marcus* and *A Quantity of Books* cases. The reasoning which led to the illogical results reached in *Metzger v. Pearcy*, 393 F.2d 202 (7th Cir. 1968), *Cambist Films, Inc. v. Illinois*, 292 F. Supp. 185 (No. Dist. Ill. 1968); *Cambist Films, Inc. v.*

*Tribell*, 293 F. Supp. 407 (E.Dist.Ky. 1968); *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639 (4th Cir. 1969), and *Bethview Amusement Corp. v. Cahn*, 416 F.2d 410 (2d Cir. 1969) failed to take into account the limited previous restraint condition which had been generally accepted in the federal custom cases and was finally upheld in *U.S. v. 37 Photographs*, 402 U.S. 363 (1971).[41] See e.g., *U.S. v. 56 Cartons of Magazines Entitled Hellenic Sun*, 373 F.2d 635 (4th Cir. 1967); *U.S. v. A Motion Picture Film Entitled "491"*, 367 F.2d 889 (2d Cir. 1966); *U.S. v. One Book Entitled "The Adventures of Father Silas,"* 249 F.Supp. 911 (SDNY 1966); and *U.S. v. A Motion Picture Film Entitled "Pattern of Evil,"* 304 F.Supp. 197, 199 (Sept. 2, 1969). *Contra, U.S. v. 18 Packages of Magazines*, 238 F.Supp. 846 (N.D.Cal. 1964). See also the discussion of these cases on this point in *U.S. v. Brown*, 274 F.Supp. 561, 565 (Oct. 18, 1967), where the Court said:

> "Although the government does not urge their application here, something should be said about the recent spate of cases involving the constitutionality of Sec-

[41] This Court should take judicial notice of the fact that there has never been a serious claim to a right to exhibit a film while the same was being *timely* pursued in the federal courts on an "obscene libel" charge. Compare *U.S. v. Unicorn Enterprises, Inc.*, 403 U.S. 925, 29 L.Ed.2d 704, 91 S.Ct. 2241 (June 15, 1971) (Language of Love). If not in the federal jurisdiction, why should there be a different rule in state cases – particularly here, where the "prompt judicial decision by the trial court" was reached 48 days after the arrest and seizure? *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 142, 19 L.Ed.2d 966, 969, 88 S.Ct. 754 (1968); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 690, n.2, 20 L.Ed.2d 225, 235, 88 S.Ct. 1298 (1968). Compare the procedure followed by Suffolk County District Attorney Byrne, commented on in the dissenting opinion of Justices Brennan, White and Marshall in *Byrne v. Karalexis*, 401 U.S. 216, 220, 27 L.Ed.2d 792, 796, 91 S.Ct. 777 (Feb. 23, 1971).

tion 305 of the Tariff Act of 1930, 46 Stat. 688, as amended, 19 USC Section 1305 (1964) *which permits customs officials to hold and inspect allegedly obscene imports to determine whether forfeiture proceedings should be instituted.*" (Our emphasis.)

It was unfortunate that the first major decision in this area was a criminal prosecution which had some of the aspects of the mass seizure, civil process, prior restraint cases. In *Metzger v. Pearcy*, 393 F.2d 202, the Marion County Prosecutor on Oct. 25, 1967, made arrests at three outdoor movie theaters where the film, "I A Woman" was shown, and seized the prints being used by the three exhibitors. A fourth arrest was made by the Indianapolis Police Department on Nov. 2, 1967, in connection with its showing at an outdoor theater in that city, where that print also was seized. All four seizures were by police officers without arrest or search warrants, incident to an arrest for a misdemeanor committed in their presence. Six months later, when the Court of Appeals ruled on the matter, *the criminal cases had not yet come to trial.*[42]

In *Metzger v. Pearcy, supra*, the Circuit Court of Appeals for the Seventh Circuit, held that an adversary hearing was necessary before the motion picture film could be seized incident to an arrest for a misdemeanor committed in the officer's presence. The court ordered the film returned, but at the same time required that the exhibitor make it available to the County Prosecutor for the trial of the criminal prosecution – a somewhat inconsistent result. The Marion County

[42]Compare the facts herein. Heller was arrested on July 31, 1969. The Trial Court decision was handed down forty-eight days later, on Sept. 17, 1969.

Prosecutor announced that he was unable to prosecute the the criminal case because of the break in the chain of evidence. It is submitted that the fundamental error of *Metzger v. Pearcy* appears at page 204, where the court stated:

> "The lessons of Books is that law enforcement officers cannot seize allegedly obscene publications without a prior adversary proceeding on the issue of obscenity. Such a seizure violates the First Amendment of the Constitution of the United States, and is a prior restraint condemned by the Supreme Court. . . ."

The court was thinking of the four prints which were seized in *Metzger v. Pearcy* and (very likely) the delay in trying the criminal case, and equated the multiple seizure in that case to the multiple seizure in *A Quantity of Books*, without further analysis, i.e., inquiring whether the state procedures in such criminal cases, as in New York, authorized a speedy adversary hearing immediately after the seizure to permit the cognizable court to focus searchingly on the obscenity issue. Compare the California rule which authorizes just such a procedure in *Holden v. Arnebergh*, 71 Cal. Rptr. 401 (Aug. 21, 1968); appeal dismissed in *Holden v. Arnebergh*, 22 L.Ed.2d 112 (Mar. 3, 1969), and the speedy procedure herein.

Thereafter, the Fourth Circuit Court of Appeals, relying on *Metzger v. Pearcy* and its faulty rationale, extended the *Quantity of Books* result as far as to say that a search warrant may not issue to seize a film as obscene, even when the issuing judge has himself taken the trouble to view the subject matter prior to his issuance of the search warrant. *Tyrone, Inc. v. Wilkinson, supra.* In the Second Circuit, Federal District Judge Pollack of the U. S. District Court for the Southern District of New York, however, held to the

contrary on almost identical facts. 208 *Cinema, Inc. v. Vergari*, 298 F.Supp. 1175 at 1177 (May 5, 1969); *Rage Books, Inc. v. Leary*, 301 F.Supp. 546, 549 (July 1, 1969).

In *Delta Book Distributors, Inc. v. Cronvich*, 304 F.Supp. 662 (July 14, 1969) (E.D.La., New Orleans Div.) reversed on other grounds in *Perez v. Ledesma*, 401 U.S. 82 (Feb. 23, 1971), Justice Boyle in a 2-to-1 decision, with Justice Rubin dissenting, wrote an opinion that went the *Pearcy* decision one better – that court indicated an adversary hearing was necessary *even as to material which had been purchased by the People*. The court footnoted that statement with the remarkable observation:

> "Of course, the defendants cannot be ordered to return the purchased materials, as in the instance of those seized, since title thereto had passed."

In his dissent, Justice Rubin voiced a more rational solution, at page 673:

> "In considering searches incident to arrest, it must be remembered, Justice White said in his dissent in Chimel v. California, 1969, 395 U.S. 752, 782-783, 89 S.Ct. 2034, 2050-2051, 23 L.Ed.2d 685, 'that there will be immediate opportunity to challenge the probable cause for the search in an adversary proceeding. The suspect has been apprised of the search ... and having been arrested, he will soon be brought into contact with people who can explain his rights .... An arrested man, by definition conscious of the police interest in him, and provided almost immediately with a lawyer and a judge, is in an excellent position to dispute the reasonableness of his arrest and contemporaneous search in a full adversary proceeding.'
>
> "That in my view is all that the state is required

to do. It is no longer an acceptable proposition in tort law that a dog is entitled to one free bite, there should be no rule in criminal law – even by virtue of the protection accorded to freedom of speech – that every peddler of pornography is entitled to one free assay at scatology.

"Never has the Supreme Court intimated such a requirement. It gave no hint of it when, without exacting any adversary hearing prior to prosecution, it upheld the conviction of a defendant under a New York statute for a sale of obscene materials to minors, in Ginsberg v. New York, 1968, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed. 2d 195, or when it upheld another conviction under the New York statute for 'hiring others to prepare obscene books, publishing obscene books, and possessing obscene books with intent to sell them.' Mishkin v. New York, 1966, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56. It is obviously impossible to hold a 'prior adversary hearing' with respect to the offense of hiring someone to prepare an obscene book and difficult to conceive that it would be practical to hold one for the offense of publishing them. Nor is the rule this Court now adopts consonant with the conviction affirmed in Ginzburg v. United States, 1966, 383 U.S. 462, 86 S.Ct. 942, 16 L.Ed.2d 31, under an indictment charging violation of the federal obscenity statute."

See also, the excellent opinion of Federal District Court Judge Frankel, speaking for a three judge court in *Milky Way Productions v. Leary*, 305 F.Supp. 289, 295-297 (Oct. 15, 1967), affirmed on the merits in *New York Feed Co. v. Leary*, 397 U.S. 98, 25 L.Ed.2d 78, 90 S.Ct. 817 (Feb. 27, 1970).

There is a plethora of conflicting decisions at the present

time following one or more of the above authorities, some of which have resulted in open confrontation between state and federal courts of the order which resulted in the enactment of 28 U.S.C. Sections 2281 and 2284. (See footnotes 6, 8 and 10 herein.) One comes away from a study of these cases with the conclusion that the results obtained depend not on established principles of law but rather upon the personal philosophy of the members of the court writing the opinion. Nowhere is it more apparent than in the study in contrast of the opinions of the District Court of Appeal upholding a seizure of the film "Sexus" without a search warrant in *Flack v. Anaheim Judicial District*, 56 Cal. Rptr. 162 (Feb. 3, 1967), and the California Supreme Court overruling that decision in *Flack v. Anaheim Municipal Court*, 59 Cal. Rptr. (July 20, 1967). The former opinion recites the traditional role of the police officer in making arrests on probable cause, at page 165:

> "It is settled law that an officer has the right and duty to arrest without a warrant for a misdemeanor committed in his presence; and to seize property by means of which the crime was committed. (Citation.) Here, the theater where the arrest and seizure were made was open to public patronage. The arresting officers had the right to enter along with other members of the public. The film in question, which was shown on the screen to the patrons assembled, was deemed by the viewing officers to be contraband, whereupon they arrested appellant and seized the film as an incident to the arrest. No citation of authority seems necessary for the proposition that probable cause need not be previously determined in each instance by a judicial officer before a police officer can make the lawful arrest accompanied

by seizure for that which would appear to 'the reasonable man' to be a crime involving contraband. Police officers cannot be relegated to a classification wherein their judgment would not meet the test enunciated in Roth v. U.S., . . . ."

The California Supreme Court reversed, enunciating a new policy and different rule.[43]

Amicus submits that a state is not required to follow the California procedural rule and create exceptions to the traditional right of a police officer to seize evidence incident to an arrest. See Point IA4, *supra*, at page 105. If the state judiciary prefers to test the officer's judgment *after arrest*, by providing for an immediate adversary hearing procedure *after arrest*, there can be no serious claim of a constitutional infringement. If for no other reason than practicality and necessity, such procedures must prevail. See *Holden v. Arnebergh*, 71 Cal.Rptr. 401 (Aug. 21, 1968) where an attack was made on the Los Angeles City Attorney's law enforce-

[43]For the past 10 years, the obscenity decisions of the California Supreme Court have been dominated by the liberal thinking of its justices. See, for example, Justice Tobriner speaking in *Zeitlin v. Arnebergh*, 59 Cal.2d 901, 31 Cal.Rptr. 800, 383 P.2d 152 (July 2, 1963) and *In Re Giannini*, 69 Cal.2d 563, 72 Cal. Rptr. 655 466 P.2d 535 (Nov. 14, 1968); Justice Mosk speaking in *Barrows v. Municipal Court*, 1 Cal. 3d 821, 83 Cal. Rptr. 819, 464 P.2d 483 (Jan. 30, 1970), and the dissenting opinions of Justices Tobriner, Peters and Mosk in *People v. Luros*, 4 Cal.3d 84 at 93, 92 Cal.Rptr. 833 at 839, 480 P.2d 633 (Feb. 18, 1971); *Dixon et al. v. Municipal Court of City and County of San Francisco*, 267 Cal. App.2d 875 73 Cal.Rptr. 587, 590 (Jan. 29, 1969), and *Landau v. Fording*, 245 Cal. App.2d 872, 54 Cal.Rptr. 177 (Oct. 24, 1966), the last of which was affirmed on the merits by this Court in *Landau v. Fording*, 288 U.S. 456, 18 L.Ed.2d 1317, 87 S.Ct.2d 109 (June 12, 1967). The *Flack* rule, decided in July of 1967, was a product of that liberal influence and a forerunner to the claim herein that there must be an adversary hearing before arrest and seizure. The absence of any discussion in *Flack* regarding the latter controversy is evidence of the recent origin and newness of such claims.

ment methods and California procedure which permits an officer to arrest and seize material incident to an arrest but requires an *immediate adversary hearing after the arrest on the issue of probable cause*, if the arrested party so desires. In his motion to dismiss the *Holden* appeal in the United States Supreme Court the City Attorney asked the following questions of this Court:

> 1. Will the task of reviewing each of the hundreds of items now reviewed by the prosecuting attorneys and their staff, be so burdensome to the courts, considering the crowded condition of their calendars, that they will be unable to act and to do so will in effect be an abdication of responsibility owed to the public at large to control the spread of pornography?
>
> 2. Can the courts afford to provide the time and the judicial personnel necessary to review the vast amount of trash publications that comprise much of the questionable material . . . ?
>
> 3. Will the court's preemption of the task now assigned by statutory law to prosecuting attorneys in deciding what is or is not obscene, add anything to true freedom of speech and press or will it result in more inability to agree as has been demonstrated by the decisions in Redrup v. N.Y. . . . ?
>
> 4. There is no constitutional requirement of judicial filtering of police judgment on probable obscenity prior to lawful arrest and seizure of allegedly obscene materials when the volume and quantity of such materials renders prior judicial scrutiny a barrier to public protection. . . ."

The City Attorney's motion to dismiss was granted. See *Holden v. Arnebergh*, 22 L.Ed.2d 112 (Mar. 3, 1969).

## II

## THE MOTION PICTURE FILM "BLUE MOVIE" IS NOT PROTECTED EXPRESSION UNDER THE FEDERAL CONSTITUTION. ON THE CONTRARY, IT IS CONDEMNED BY IT.

### A. The Motion Picture Film "Blue Movie" is Obscene In The *International Sense* (Hard-Core Pornography) And As Such is Condemned Under The Federal Constitution.

In its opinion in *Roth-Alberts*, 354 U.S. 476, 1 L. Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957, this Court noted that it was the *universal judgment of civilized nations that obscenity should be proscribed.* See *Roth-Alberts* at p. 484:

> ". . . implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is *mirrored in the universal judgment that obscenity should be restrained*, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. . . ." (Our emphasis.)

If government is to have meaning, the laws must be interpreted according to the cultural base from which the law is drawn. According to that base "indecency" does have a concrete value. This Court has not yet seen fit to overrule *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) It is a "Judaeo-Christian" culture which this Court is called upon to interpret. If the laws of the land, according to that "Judaeo-Christian" base, uniformly proscribe public indecency, then each citizen has and enjoys a per-

sonal right under that government to live in an area which is free of public indecency. Amicus submits that, for this Court to refuse to acknowledge and enforce that value is to fail to recognize civil rights in the citizenry accruing and existing under the Fifth, Ninth, Tenth and Fourteenth Amendments of the Federal Constitution and the corresponding sections of the State Constitution – civil rights which are enforceable under the law, irrespective of whether or not criminal penalties are attached.

During the past 15 years, a blanket of confusion has engulfed the motion picture production area and all but destroyed that industry's understanding of the public responsibility which it bears under this Nation's obscenity laws. Such confusion[44] is due in no small part to the failure of this Court to enunciate a judicial philosophy which truly reflects the public mores which have governed this Nation since its founding. A casual reference to and brief reflection on the moral laws of this Nation dealing with sexuality, as codified by the state legislatures (see Appendix B pp. 1-16 is cogent proof that such public mores do presently exist and are well defined. See also, *City of Youngstown, Ohio v. DeLoreto*, 251 N.E.2d 291, 48 Ohio Op. 2d 393 at 400 (Sept. 10, 1969); *State of Ohio ex rel. Ewing v. Without A Stitch*, 57 Ohio Op. 2d 184 at 187 (July 9, 1971); and *State of Ohio*

[44]The Court in *People v. Kirkpatrick*, 316 N.Y.S.2d 37 (Oct. 28, 1970) had the following to say at page 42 on this general confusion as it related to the criminal law:

"There is perhaps no area of criminal law in such utter state of confusion and frustration as that visited upon the publication and dissemination of obscene material 'Confusion now hath made its masterpiece' (Macbeth, Act II).

"The confusion, in great measure, must be attributable to the incredible divergence of views of the men on the United States Supreme Court, to whom all look for guidance . . ."

*ex rel. Keating v. Vixen*, 272 N.E.2d 137 at 140, 27 Ohio St. 2d 278 (July 21, 1971). Amicus submits that the public policy declaration of the New York State Legislature, making motion picture films showing acts of sexual intercourse, contraband under New York Penal Law section 410.00, and establishing the right to seize "equipment" (the print), and providing for statutory forfeitures in connection with such exhibitions,[45] is incontestable proof of the proposition that such public mores do exist, and strong support for the rationale employed by the Ohio Supreme Court in the *De Loreto*, supra, *Wilhout A. Stitch*, supra, and *Vixen*, supra, cases. See also *Wisconsin v. Voshart*, 159 N.W.2d, 8 (June 7, 1968) and the Georgia Supreme Court speaking recently in *Evans Theatre Corp. v. Slaton*, 180 S.E.2, 712 (Mar. 4, 1971); *Walter v. Slaton*, 182 S.E.2d 464 (May 13, 1971); *1027 Peachtree Corp. dba Metro Theatre v. Slaton*, 184 S.E.2d 144 (Oct. 7, 1971) and *Paris Adult Theatre v. Slaton*, 185 S.E.2d 768 (Nov. 5, 1971).

This Court cannot disregard the plain meaning of the English language. How can Petitioner hope to prevail with his claim that "Blue Movie" is protected material under New York law and the federal constitution when one considers that New York Penal Law section 410.00(9) specifically states:

"For the purposes of this section only, a porno-

[45] New York Penal Law section 410.00(8) provides for a statute of limitations of two years on a cause of action for damages for a wrongful seizure under the statute. Given such a remedy, how can Petitioner, on balance, be heard to complain about the impact of such a seizure. See the opinion of Justice Harlan, writing for a majority of five on the views of this Court re forfeiture for illegal activities in *U.S. v. U.S. Coin and Currency*, 401 U.S. 715, 28 L.Ed.2 434, 91 S.Ct. 1041 (Apr. 5, 1971).

graphic . . . motion picture, is defined as a . . . motion picture showing acts of sexual intercourse . . . This section shall not be construed as applying to bona fide medical photographs or films . . ."

On this rhetorical question see, in particular, the time-motion of "Blue Movie" at pages 26 to 60.

1. THE COMMON STANDARDS OF RIGHT AND WRONG EMBODIED IN THE STATUTORY LAW OF THIS NATION AND THE STATE OF NEW YORK SHOULD BE APPLIED AS THE RULE OF LAW IN THIS CASE IN FINDING THE "BLUE MOVIE" TO BE OBSCENE AS A MATTER OF LAW.

It is the basic contention of Amicus that the eyes of this Court, in reviewing the New York Supreme Court ruling below, should be focused upon the concepts which support the statutes being applied by Respondents, that is the universal verity that lewdness and obscenity are public nuisances, which are abatable under the law, and the ethical values shared by this Nation, as a whole, as defined in the legislative halls and documented in state and federal statutes and city ordinances. A state-by-state survey of the Nation's laws dealing with lewdness, indecent exposure, obscenity, prostitution, sodomy, adultery, fornication, incest and profanity is attached as Appendix "B". Amicus submits that these laws define the national standards which everyone in the courtroom today is seeking to ascertain. This Court has on many occasions stressed community ethical values as the basis for constitutional adjudication. *Adamson v. Calif.*, 332 U.S. 46, 91 L.Ed. 1903, 67 S.Ct. 1672 (Justice Frankfurter concurring opinion). *Louisiana ex rel Francis v.*

*Resweber*, 329 U.S. 459, 470, 91 L.Ed.422, 67 S.Ct. 374 (concurring opinion). In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 1 L.Ed.2d 1469, 77 S.Ct. 1325, handed down on the same date as the *Roth-Alberts* decision, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957), Justice Frankfurter, in speaking for the majority of that Court in a case interpreting the New York obscenity statutes said, at page 1473:

> "In an unbroken series of cases extending over a long stretch of this Court's history, *it has been accepted as a postulate* that 'the primary requirements of decency may be enforced against obscene publications.' Id. 283 U.S. at 716." (Our emphasis.)

In *Solesbee v. Balkcom* (1950), 339 U.S. 9, 16, 27, 94 L.Ed. 604, 70 S.Ct. 457, reh. den. 339 U.S. 926, 94 L.Ed. 1348, 70 S.Ct. 618, Justice Frankfurter wrote that due process

> "embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are, the less likely they are to be explicitly stated. But respect for them is of the very essence of the Due Process Clause. In enforcing them this Court does not translate personal views into constitutional limitations. In applying such a large untechnical concept as 'due process,' the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions."

The values of the culture, Justice Frankfurter added, can

often be detected *from the practices in the states*. He illustrated the point in this fashion: "The manner in which the states have dealt with this problem furnishes a fair reflection, for purposes of the Due Process Clause, of the underlying feelings of our society about the treatment of persons who become insane while under sentence of death."

In reviewing the ruling of the New York Supreme Court which held "Blue Movie" to be hard-core pornography as a *matter of law*, this Court should judicially recognize that it was in the background of this Nation's well-established and shared ethical values that the producer and exhibitor of that film opted to move into the motion picture entertainment field and capitalize commercially via sensationalism, upon the natural abhorrence of civilized government to public displays of explicit sexual conduct. *One just does not fornicate in public, be it actual or simulated* – nor may he on the public screen. (See Judge Burke's opinion, infra at page 152.) The relevant historical facts under consideration certainly encompass this Nation's ethical values, as reflected in the well-knit pattern of city, state and federal laws relating to public sexual conduct (such as laws dealing with nudity, fornication, prostitution, indecent exposure, sodomy, solicitation of unnatural sex act, etc.) Those values exist for the benefit of the family unit which is at the very core of government in our Judaeo-Christian culture and are deserving of this Court's strong support.

The common standards of right and wrong embodied in the statutory law of New York should be applied as the rule of law in this case in upholding the New York Supreme Court's finding that the film "Blue Movie" is UNLAWFUL AS A MATTER OF LAW. This was the view of the unanimous Ohio Court in *City of Youngstown v. De Loreto*, 251

N.E.2d 491 (September 10, 1969). In *De Loreto*, the court enumerated the state statutes and city ordinances which prohibited specific immoral conduct. From that the court deduced what the Moral Standards of Ohio People on Sex were. (See *De Loreto* at pages 500 and 501. See also *Ohio ex rel Ewing v. "Without A Stitch,"* 276 N.E.2d 655 at 659 (July 9, 1971) and *Ohio ex rel Keating v. "Vixen,"* 272 N.E. 2d 137 at 141 (July 21, 1971).

It is the prerogative and duty of this Court to take judicial notice of the laws of the State of New York and of this Nation relating to sexual morality and apply them in reviewing the issue of obscenity in this case.

The vast history of the common law and the statutes of the State of New York make clear those particular areas of public conduct which are so immoral, so contrary to the immemorial custom of propriety of the people, so opposite to the natural sense of conscience and justice of the people, so pervasively at odds with the community notions of right and wrong, so consistently maintained as illegal and contrary to Anglo-American public policy that their display and exhibition to the public, either live or recorded, is UNLAWFUL AS A MATTER OF LAW. Obscenity, public indecency, incest, lewdness, immoral exhibitions, sexual perversion, and sodomy et seq., all are enumerated acts the public portrayal of which a judge should recognize as being part of the common law specification of "obscenity." See Appendix B - 10 "New York."

The courts have always been willing to take judicial notice of those facts and policies that are of general and incontrovertible knowledge. Such matters include those facts of a common or general knowledge that are well and authoritatively settled, not doubtful or uncertain, and known to be

within the limits of the jurisdiction of the court. (28 Am. Jur.2d Sec. 34) They also have included a recognition of the ordinary instincts, passions, emotions, and motives which universally, in a greater or lesser degree, influence the actions and conduct of mankind. (28 Am.Jur.2d Sec. 114) In addition, judicial notice has been extended to matters of public and social welfare (29 Am.Jur.2d Sec. 143) and the customs and usages of man which are generally known or accepted to an extent sufficient to make them matters of common knowledge. (28 Am.Jr.2d Sec. 121)

2. THE PERFORMANCE OF SEXUAL INTERCOURSE IN PUBLIC, WHETHER REAL OR SIMULATED, LIVE, OR AS PART OF A MOTION PICTURE FILM OR STAGE PLAY IS AGAINST PUBLIC POLICY AND AS SUCH IS OBSCENE PER SE:

By far the best legal opinion on this point of law is that of Judge Burke speaking for the majority of the New York Court of Appeals in *Trans-Lux Dist. Corp. v. Bd. of Regents*, 248 N.Y.S.2d 857 (Mar. 26, 1964), at page 857:

> "While typically applicable to 'speech' and 'press' in the forms known to the framers, the guarantee of the First Amendment has been read to include anything that is asserted to be someone's way of saying something. The most familiar instances of this application are physical conduct and motion pictures (Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098, supra). Cases involving conduct as a form of expression have been frequent in labor law and provide a useful illustration of the transition from a somewhat doctrinaire application of the First Amend-

ment (see e.g., Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, supra) to a realization that, while conduct may be speech, it still remains conduct and does not cease to present its unique problems of social control. It is now the law that even peaceful picketing may be forbidden where it violates State labor laws that are not themselves designed as restrictions on freedom of speech (Local Union No. 10, etc., Plumbers Union v. Graham, 345 U.S. 192, 72 S.Ct. 383, 97 L.Ed. 946). Conduct that is proscribed for valid public purposes is not immune merely because engaged in with a view to expression (Giboney v. Empire Ice & Storage Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834). For example, in People v. Stover, 12 N.Y.2d 462, 240 N.Y.S.2d 734, 191 N.E.2d 272, supra, app. dsmd. for want of a substantial federal question, 375 U.S. 42, 84 S.Ct. 147, 11 L.Ed.2d 107, this court upheld an 'Aesthetic' ordinance prohibiting the display of soiled laundry on a clothesline in the defendants' front yard, despite the fact that the display was an expression of social protest.

"Films, by their nature, may lie on either side of the division between speech and conduct. The opinions of the Supreme Court reversing this court in the cases of advocacy of adultery and thematic sacrilege make that plain. But it also follows that if 'picketing may include conduct other than speech, conduct which can be made the subject of restrictive legislation' (Giboney v. Empire Ice & Storage Co. supra, 336, U.S. p. 501, 60 S.Ct. p. 690, 93 L.Ed. 834) then so may films. In this regard, it will be noted that the Supreme Court has not yet expressed its opinion in a case involving allegedly obscene behavior on the screen . . . ."

And at page 860:

"In Kingsley Intern. Pictures Corp. v. Regents, 360 U.S. 684, 79 S.Ct. 1362, 2 L.Ed.2d 1512, the opinion of the court repeatedly distinguishes between the right to communicate any idea, however deviant from orthodoxy, and 'the manner of its portrayal' (360 U.S. p. 688, 79 S.Ct. p. 1365, e L.Ed.2d 1512). The 'freedom to advocate ideas' was protected, not any supposed right to behave lewdly in a public place. Even more to the point is the concurring opinion of Mr. Justice Clark who wrote: 'I see no grounds for confusion, however, were a statute to ban "pornographic" films, or those that "portray *acts* of sexual immorality, perversion or lewdness." If New York's statute had been so construed by its highest court I believe it would have met the requirements of due process. Instead, it placed more emphasis on what the film teaches than on what it depicts. There is where the confusion enters.' '360 U.S. p. 702, 79 S.Ct. p. 1372, 3 L.Ed.2d 1512; emphasis in original).

"It is my view that a filmed presentation of sexual intercourse, whether real or simulated, is just as subject to State prohibition as similar conduct if engaged in on the street. I believe the nature of films is sufficiently different from books to justify the conclusion that the critical difference between advocacy and actual performance of the forbidden act is reached when simulated sexual intercourse is portrayed on the screen. I take it to be conceded that New York may constitutionally prohibit sexual intercourse in public. As Mr. Justice Douglas acknowledged,dissenting in Roth v. U.S. . . . in contrasting books with conduct: 'I assume

there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct' (emphasis in text).

"This observation is equally pertinent, of course, whether the sexual exhibitionism is done spontaneously in the street or in theaters for money (e.g., Penal Law, Consol. Laws. c.40, §§ 43, 1140, 1140-a, 1140-b). There have been many cases dealing with what sort of behavior was covered by statutes against sexual exhibitionism and the like, but they were solely concerned with statutory interpretation, never, obviously, the First Amendment. (Miller v. People, 5 Barb. 203; People v. Burke, 243 App. Div. 83, 276 N.Y.S. 402, affd. 267 N.Y. 571, 196 N.E. 585; People v. Mitchell, 296 N.Y. 672, 70 N.E.2d 168; People v. Dash, 282 N.Y. 632, 25 N.E.2d 979.)

"This comparison between the acknowledged competence of the State to forbid public or semi-public sex displays and its power to exert similar control over similar conduct depicted on the screen is not intended to imply any broad theory of legal equivalence between real conduct and a filmed imitation. Indeed, the meaningful comparison exists only in a narrow range of cases. In most instances, the real conduct is illegal because of what is accomplished by the person, as in murder, forgery, or adultery. In such cases, the filmed dramatization obviously does not share the evil aimed at in the law applicable to the real thing. Where, however, the real conduct is illegal, not because of what

is accomplished by those involved, but simply because what is done is shocking, offensive to see, and generally believed destructive of the general level of morality, then a filmed simulation fully shares, it seems to me, the evil of the original. In such cases, the free expression protection of the First Amendment must apply to both or neither. It makes no sense at all to say that the conduct can be forbidden but not the play or film.

"The pattern of statutory regulation in New York aims at offensive – more properly, obscene – displays of conduct whether in the street (Penal Law, §§ 43, 1140, 1140-b), on the street (Penal Law, § 1140-a; People v. Vickers, 259 App. Div. 841, 19 N.Y.S.2d 165 – lewd dance) or on the screen (Penal Law, §§ 1140-a, 1141; Education Law, § 122). These laws care not about the communication of ideas (see Stromberg v. California, 283 U.S. 369, 51 S.Ct. 532, 75 L.Ed. 1117); they are aimed at certain narrow sorts of conduct. It seems to me, therefore, that if the defendants in People v. Stover, supra, could constitutionally be prohibited from selecting the forbidden form of conduct as the vehicle for the communication of their protest, then this petitioner cannot choose acted-out sexual intercourse as the vehicle for its art (see, also, People v. Vickers, supra, where a performer was prohibited from choosing a certain sort of dance as her vehicle, and the 'nude gymnasium' prohibited by Penal Law, §§ 1140-b). Numerous other instances also suggest themselves.

"If we can accept the obvious – that sexual intercourse whether performed in the park or simulated on the stage or screen is in itself a form of conduct (in

which the public have an interest), it is apparent that when this defendant chooses to use it as a vehicle for the expression of art it has 'brigaded' the communication (to the extent that it is 'communication') with conduct completely. In so doing the petitioner has subjected itself to such regulations as are appropriate to the conduct when engaged in for reasons having nothing to do with expression. There is otherwise no difference between advocacy and action. (Compare Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, with Local Union No. 10, etc., Plumbers Union v. Graham, 345 U.S. 192, 73 S.Ct. 585, 97 L.Ed. 946.) 'Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it' (Douglas, J., dissenting in Roth v. United States, 354 U.S. 476, 514, 77 S. Ct. 1304, 1324, 1 L.Ed.2d 1498)."

Judge Burke's closing principle, stated at page 863 is a complete answer to the suggestion of petitioner that "redeeming social importance" has been established through the testimony of defense witnesses Parker Tyler (See Statement of the Case, pages 65-70), Charles Winick (Statement of the Case, pages 70-77) and Thomas Phillips (Statement of the Case, pages 77-82.

"To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared overriding public policy against pornographic displays. Since no other profession is privileged to bend public morals, public and law to its internal craft standards, then neither should producers of films."

A majority of the California Supreme Court appear to be

in agreement with Justice Burke. See *Billie Dixon, Richard Bright and Michael McClure v. Municipal Court of City and County of San Francisco*, 267 Cal. App.2d 875, 73 Cal. Rptr. 587 (Dec. 2, 1968). Hearing denied January 29, 1969, (with Justices Peters, Tobriner and Mosk dissenting) involving the stage play "The Beard." Justice Devine, speaking for an unanimous court (Court of Appeal), First District, Division 4) said at page 589:

> "There are several sexual acts which, although not criminal in themselves, as is oral copulation, doubtless would be deemed by many a trier of fact applying First Amendment standards to be obscene even when contained in a play or a dance or other performance with full First Amendment protection. It is entirely possible that the simulation of such acts, and of the act in 'The Beard,' would itself be an obscene act. The positions and motions of the performers, the duration of the act, the accompanying dialogue and all of the circumstances, taken together with the content of the entire work, may establish an imitation of an actual deed to be obscene.

The same principle was recently voiced by the Georgia Supreme Court in its decision in *Evans Theatre Corp. et al. v. Slayton (supra)* holding the motion picture film "I Am Curious (Yellow)" to be enjoinable as a public nuisance because of the sexual activity portrayed therein:

> "The Criminal Code of Georgia makes penal a lewd performance in public, including an act of sexual intercourse and a lewd appearance in a state of nudity. Code Ann. § 26-2011 (Ga. L. 1968, pp. 1249, 1301). such acts are prohibited, not because of the injury inflicted on other individuals, as in the case of murder or robbery, but because the acts are offensive to the

majority of the people. If any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. *There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public.*" (Our emphasis.)

3. WHERE OBSCENITY PER SE EXISTS THE COURT CAN TAKE JUDICIAL NOTICE OF SUCH FACT AND NO FURTHER EVIDENCE ON SUCH ISSUE IS NECESSARY.

In *Mitchum v. State of Florida*, 251 So.2d 298 (Aug. 12, 1971) the District Court of Appeal of Florida made the following comment as to the application of judicial notice to material which was incontrovertibly obscene

"Examination of appellants' argument under this point indicates that the real issue raised is the contention that the absence of testimonial evidence, separate and apart from the magazines themselves considered as exhibits, renders the order of the lower court prejudicially erroneous and therefore reversible.

"In support of the latter proposition, appellants rely heavily on Justice Frankfurter's concurring opinion in Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205, reflecting his view, not that of the court, that expert testimony is necessary to a finding of obscenity by a court. That view being found only in a concurring opinion is, of course, not binding upon us as precedent nor are the holdings in the obscenity cases from several of our sister states which require testimonial evidence as a predicate for a finding of obscenity necessarily binding on this court. We have

read them, of course, and while they appear sound and scholarly, they simply do not reflect our view of the law relating to the subject matter. In essence, those cases encroach upon the entire concept of judicial notice as approved by our courts as well as those of other jurisdictions. *Long ago, it was held that in proper circumstances 'judicial notice' is superior to evidence since it fulfills the object which evidence is designed to fulfill and makes evidence on the point established by judicial notice unnecessary.* Amos v. Moseley, 74 Fla. 555, 77 So.619. It is designed as the cognizance of certain facts which judges and jurors may properly take and act upon without proof, because they already know them. United States v. Hammers, D.C., 241 F. 542. Courts are presumed to know what everyone knows, 13 Fla. Jur., Evidence § 14. Thus, the question resolves itself into whether the materials here involved are of such character as to establish circumstances whereunder the court may determine the obscenity question without evidence. (Emphasis ours.)

"We hold that the materials herein are 'hard-core pornography' and therefore within the rule announced in United States v. Wild, 422 F.2d 34 (2d Cir. 1970) cert. denied 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed.2d 152, reh. den. 403 U.S. 940, 91 S.Ct. 2242, 29 L.Ed.2d 720. There the government introduced no evidence other than the materials themselves which was claimed to be error. In rejecting the contention, the Court of Appeal reviewed the pertinent cases and held as follows: ***.

"In a remarkably similar case in which a conviction under section 1461 was unanimously affirmed, Judge Prettyman wrote:

"'Most of the difficulty which enshrouds the discussion of the law concerning obscenity and filth develops upon consideration of books and magazine articles. Here arise problems of scienter, the meaning and effect of the whole, the value of the work to proper interests of the public, the contemporary community standards in similar matters, and other baffling problems under our precious right of free speech, discussed in several opinions in Smith v. California (361 U.S. U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205). But we have no such problem in the case of bar. These are stark, unretouched photographs – no text, no possible avoidance of scienter, no suggested proper purpose, no conceivable community standard which would permit the indiscriminate dissemination of the material, no alleviating artistic overtones. These exhibits reflect a morbid interest in the nude, beyond any customary limit of candor. They are "utterly without redeeming social importance," * * * *

"'*We think that photographs can be so obscene – it is conceivably possible that they be so obscene – that the fact is incontrovertible.* These photographs are such. United States v. Womack (Womack v. United States), 111 U.S. App. D.C. 8, 294 F.2d 204, 205-206 (footnote omitted), cert. denied 365 U.S. 859, 81 S.Ct. 826, 6 L.Ed.2d 822 (1961).' (Emphasis ours.)

"See also, Kahm v. United States, 300 F.2d 78 (5th Cir.), cert. denied 369 U.S. 859, 82 S.Ct. 949, 8 L.Ed. 2d 18 (1962); United States v. Davis, 353 F.2d 614 (2d Cir. 1965), cert. denied 384 U.S. 953, 86 S.Ct. 1567, 16 L.Ed.2d 549 (1966). Cf. Manual Enterprises v. Day, 370 U.S. 478, 489-490 and n. 13, 82 S.Ct. 1432, 8 L.Ed.

2d 639 (1962) (opinion of Harlan, J.) * * * *

"(5,6) The above views expressed by the court in Wild were adopted by this court in the informative opinion of this court in Collins v. State Beverage Department, 239 So.2d 613 (Fla. App. 1970). It is clear then that the rule in this jurisdiction is that if the materials before the court are what is termed 'hard-core pornography' no testimonial evidence is necessary to support a finding of obscenity * * * *."

In *Morris v. U.S.*, 257 A.2d 341 (Dec. 2, 1969) the Court voiced the following test for material which was "obscene *per se*," i.e., obscene as a matter of law:

"Although the definition and elements of obscenity have been authoritatively stated in *Roth* and *Memoirs*, definition of the oft-used terms 'hard-core obscenity, and 'obscenity per se' has been neglected by the Supreme Court. The Court of Special Appeals of Maryland has faced this problem before and has defined these terms in the following language: Hard-core pornography or obscenity per se is obscenity which 'focuses predominantly upon what is sexually morbid, grossly perverse and bizaare without any artistic or scientific purpose of justification.' There is no desire to portray (it) in pseudoscientific or 'arty' terms. It can be recognized by the insult it offers, invariably, to sex and to the human spirit. It goes substantially beyond customary limits of candor and deviates from society's standards of decency in the representation of the matters in which it deals. It has a patent absence of any redeeming social value; it speaks for itself and screams for all to hear that it is obscene. It is not designed to be a truthful description of the basic reali-

ties of life as the individual experiences them but its main purpose (is) to stimulate erotic response. . . . No proof, other than the viewing of it, is required to determine if it is, in fact, obscene.

"It is clear to this court that where obscenity per se is involved, the prosecution is not required to offer any evidence (beyond the material or performance itself) that it is pornographic or obscene or that it is below the national community standards. Womack, supra; Hudson, supra. *In other words, if reasonable men could not differ and they could come to but one conclusion, i.e., that the material or performance is sexually morbid, grossly perverse, and bizarre, without any artistic or scientific purpose or justification,* then the Government on its case-in-chief need not offer any evidence of national community standards." (Our emphasis.)

See also *Wilhoit v. U.S.*, 279 A.2d 505, cert. den. 30 L.Ed.2d 546 (Dec. 14, 1971) (Douglas would grant cert. and set the case for argument). *Mitchum v. State of Florida*, 251 S.2d 298 at 301 (Aug. 12, 1971); *U.S. v. Womack*, 111 U.S. App. D.C. 8, 294 F.2d 204, cert. den. 365 U.S. 859, 81 S.Ct. 826, 5 L.Ed.2d 822 (Mar. 27, 1969); *U.S. v. Wild*, 422 F.2d 34 (Oct. 29, 1969), cert. den. 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed.2d 152, rehrg. den. 403 U.S. 940, 91 S.Ct. 2242, 29 L.Ed.2d 720 (June 21, 1971); *Mitchum v. State of Florida*, 244 S.2d 159, 160 (Jan. 26, 1971); *Collins v. State Beverage Dept.*, 239 S.2d 613, 616; *Marks v. State of Florida*, 262 S.2d 479 (May 23, 1971); *Kaplan v. U.S.*, 277 A.2d 477 at 479 (May 10, 1971); *Illinois v. Ridens*, 282 N.E.2d 691 at 695 (Mar. 21, 1972); *State of Minn. v. Getman*, 195 N.W.2d 827 at 829 (Mar. 17, 1972); Justice

Herndon dissenting in *Harmer v. Tonylyn Productions*, 100 Cal. Rptr. 576, 579 (Mar. 2, 1972); *United Theatres of Florida v. State ex rel Gerstein*, 259 S.2d 210, 212 (Feb. 15, 1972); *U. S. v. Miller*, 455 F.2d 899 at 902 (Mar. 22, 1972).

In *Boreta Enterprises, Inc., v. Dept. of Alcohol Beverage* 2 Cal. 385, 84 Cal. Rptr. 113 at 123 (Feb. 26, 1970), Justice Sullivan writing for a majority of the California Supreme Court, acknowledged that the conduct at issue could be so extreme as to properly conclude that the subject matter was "*per se*" contrary to public morals, at page 123:

> "This, however, is not the focal point of our present inquiry. We here examine the power invested by the Constitution in the Department to revoke a specific alcoholic beverage license 'if it shall determine *for good cause* that the . . . continuance of such license would be contrary to public . . . morals . . . .' (Cal. Const. Art. XX, § 22, italics added; see fn. 4, *ante*.) This requires us to observe the distinction between the imperatives of the moral order and the mandates of the civil order. It is therefore the *public* morals, not the *private* morals of the officials or employees of the Department, however conscientious or well-intentioned, which must be the criteria in the instant case. In other words, in resolving the issue before us, our reference must be to the morals of the people, that is, to those of the community at large, of the whole body of the people. (See Duskin v. State Board of Dry Cleaners (1962), 58 Cal.2d 155, 163, 23 Cal. Rptr. 404, 373 P.2d 468; see definition of 'public,' Black's Law Dictionary (4th ed. 1951); Webster's Third New International Dict. If by 'morals' we mean 'the moral practices of an indi-

vidual, or culture; habits of life or modes of conduct' (Webster's op. cit., see 'moral') we think the term 'public morals' must be taken to mean the moral practices or modes of conduct 'pertaining to a . . . whole community; . . . relating to . . . the whole body of people or an entire community.' (Black's Law Dictionary, *supra*; Duskin v. State Board of Dry Cleaners, *supra*.)

"There may be cases in which the conduct at issue is so extreme that the Department could conclude that it is *per se* contrary to *public* morals. By this we mean that it is so vile and its impact upon society is so corruptive, that it can be almost immediately repudiated as being contrary to the standards of morality generally accepted by the community after a proper balance is struck between personal freedom and social restraint. . . ." (Italics theirs.)

In *Smith v. Commonwealth of Kentucky*, 465 S.W.2d 918, 920 (Feb. 26, 1971) the Kentucky Court of Appeals similarly followed the same rules:

"Appellant moved for a directed verdict of acquittal at the close of the Commonwealth's evidence, on the ground that no proof had been presented to show that the questioned matter was utterly without redeeming social value. The court properly overruled that motion, inasmuch as *the publication demonstrated on its face that it possessed no such redeeming social value. That determination was properly made as a matter of law in the circumstances of this case . . . .*" (Our emphasis.)

4. THE SUPPRESSION OF "BLUE MOVIE," THRU CRIMINAL PROSECUTION, IS NOT "THOUGHT CONTROL." THE INTEREST BEING PROTECTED IS THE PEOPLE'S RIGHT TO CONTROL "PUBLIC MORALITY" - A TENTH AMENDMENT RIGHT, GUARANTEED BY THE BILL OF RIGHTS.

Petitioner's argument that the suppression of "Blue Movie" is "thought control" (Brief for Petitioner at page 21) overlooks the fact that the Bill of Rights encompasses the first *ten* amendments to the federal constitution.

(a) THE RIGHT TO PROSCRIBE OBSCENITY IS A TENTH AMENDMENT RIGHT, GUARANTEED BY THE BILL OF RIGHTS WHICH RESERVES TO THE STATES AND TO THE PEOPLE THE RIGHT TO CONTROL AND REGULATE "PUBLIC MORALITY" *i.e.*, PUBLIC CONDUCT, WHICH AFFECTS THE PEOPLE AS A WHOLE. OBSCENITY CONTROLS DO NOT ATTEMPT TO CONTROL THOUGHT OR REACH "PRIVATE MORALITY."

Obscenity controls do not attempt to reach *private morality* such as what a person may read or see. The proscription of obscenity is grounded upon the legitimate governmental aim of controlling and regulating "*public morality*" - public conduct, which affects the people as a whole.

Although it is true that the governmental restraints imposed by such obscenity laws must, of necessity, *indirectly* restrict the availability of such materials for some persons who might wish to see movies, such as are involved herein, that same result is obtained whenever any "vice" laws are enforced, such as those proscribing prostitution. It would be, however, a gross distortion of the law to suggest that

this indirect effect on private morals is the *basis* for such criminal sanctions and thus an unconstitutional infringement on the rights of an individual.

Law and morality are not identical. Although interrelated, they are necessarily distinct. Not every moral evil is proscribed by man-made law. *Public* morality is to be distinguished from *private* morality, as to which it is often said, the law does not concern itself. On the other hand, our law has always recognized the importance of maintaining a high *public* morality. ,

Nowhere was the function of such "vice" laws more clearly stated than in the arguments of the prosecutor two and one-half centuries ago in the first obscenity conviction in *Rex v. Curl*, 2 Strange 789 (1727):

> "3. As to Morality. Destroying that is destroying the peace of the government for government is no more than public order, which is morality. My Lord Chief Justice Hale used to say Christianity is part of the law, and why not morality too? I do not insist that every immoral act is indictable, such as telling a lie, or the like; *but if it is destructive of morality in general, if it does, or may, affect all the King's subjects, it then is an offense of a public nature. And upon this distinction it is that particular acts of fornication are not punishable in the Temporal Courts* (Common Law courts) *and bawdy houses are.* In Sir Charles Sedley's case it was said, that this Court is the custos-morum of the King's subjects. 1 Sid. 168." (Our emphasis.)

Louis B. Schwartz, co-reporter of the Model Penal Code, explains the governmental function of the obscenity crime in society as follows, in 63 Columbia Law Review, Morals Offenses, and the Model Penal Code (cited by this Court

with approval in *Ginzburg v.* U.S., 16 L.Ed.2d 38, fn. 12; page 39, fn. 14, page 41, fn. 19; *Mishkin v.* N.Y., 16 L.Ed. 2d 53, fn. 9; and *Stanley*, 394 U.S. 557, fn. 10) at page 671:

> "But the great majority of people believe that the morals of 'bad' people do, at least in the long run, threaten the security of the 'good' people . . . . it is hard to deny people the right to legislate on the basis of their beliefs not demonstrably erroneous, especially if these beliefs are strongly held by a very large majority. The majority cannot be expected to abandon a credo, and its associated sensitivities, however irrational, in deference to a minority's skepticism."

And at page 672:

> "If unanimity of strongly held moral view is approached in a community, the rebel puts himself, as it were, outside the society when he arranges himself against those views . . . the community cannot be expected to make (his) first protests respectable or even tolerated by the law . . . ."

Mr. Schwartz continues, at page 681:

> "But equally, it is not merely sin-control of the sort that evoked Professor Henkin's constitutional doubts. Instead, the community is merely saying, 'Sin, if you must, in private. Do not flaunt your immoralities where they will grieve and shock others. If we do not impose our morals upon you, neither must you impose yours upon us, undermining the restraint we seek to cultivate through family, church, and school.' *The interest being protected is not* directly or exclusively, the souls of those who might be depraved or corrupted by the obscenity, *but the right of parents to shape the moral notions of their children, and the right of the general*

*public not to be subjected to violent psychological affront.*" (Our emphasis.)

Concerning the power of government to regulate matters relating to *public morals* and power to say what is offensive to *public morality*, this Court said in *Mugler v. Kansas*, 123 U.S. 623 (1887):

> "The power to determine such questions (what is offensive to public morality) so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding their own appetites or passions, may be willing to imperil the peace and security of many, provided only they are permitted to do as they please. *Under our system, that power is lodged in the legislative branch of the government.* It belongs to that department to exert what are known as police powers of state, *and to determine primarily, what measures are appropriate or needful for the protection of the public morals*, the public health, or the public safety . . . ." *(Our emphasis.)*

See also, Federal District Judge Peirson Hall speaking on "The Monster Vice" in *U.S. v. Four (4) Books*, 289 F. supp. 972 at 973 (Sept. 10, 1968), cited herein at p. 18 footnote 15.

The existence of the vice of obscenity is the symptom of a disorder which probability tells us, will lead to ruin. Historian Arnold Toynbee tells us that 19 out of the 21 great civilizations which flourished in world history, crumbled into ruin . . . not because of armed aggression from without but because of moral decay from within. In 1874 Justice Swayne, speaking for an unanimous United States Supreme Court in *Trist v. Child*, 21 Wallace 441, 450 (1874) had the following to say about the nature of the underpinnings of this Nation:

"The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed the fabric must fall. Such is the voice of history . . . ."

In sum, the case for the governmental action against obscenity was stated by the Associate Justice Harlan in his concurring opinion in *Roth v. U.S.*, 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (June 22, 1957), at page 502:

"The state can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards . . . ."

The long range indirect effects inference, accepted by Mr. Justice Harlan, was acknowledged by a majority of this Court in *Ginsberg v. N.Y.*, 390 U.S. 629, 20 L.Ed.2d 195, 86 S.Ct. 942, where the Court referred to the observations of psychiatrist Dr. Gaylin (with apparent approval) at page 642, fn. 10:

". . . but despite the vigor of the ongoing controversy whether obscene material will perceptively create a danger of anti-social conduct, or will probably induct its recipient to such conduct, a medical practitioner recently suggested that the possibility of harmful effect to youth cannot be dismissed as frivolous. Dr. Gaylin of the Columbia University Psychoanalytic Clinic, reporting on the view of some psychiatrists in 77 Yale Law Review at 592-593, said:

"'It is the period of growth (of youth) when these patterns of behavior are laid down, when environmental stimuli of all sorts must be integrated into a

workable sense of self, when sensuality is being defined and fears elaborated, when pleasure controls it is in this period, undramatically and with time, that legalized pornography may conceivably be damaging.'

"Dr. Gaylin emphasizes that a child might not be as well prepared as an adult to make an intelligent choice as to the material he chooses to read:

"'Psychiatrists . . . made a distinction between the reading of pornography, as unlikely to be per se harmful, *and the permitting of the reading of pornography, which was conceived as potentially destructive.* The child is protected in the reading of pornography by the knowledge that it is pornographic, i.e., disapproved. It is outside of parental standards and not a part of his identification processes. *To openly permit implies parental approval and even suggests seductive encouragement.* If this is so of parental approval, it is equally so of societal approval – another potent influence on the developing ego.'"

It seems obvious to Amicus herein that, in the context employed, those members of this Court who joined in that opinion must have recognized the "indirect" effects on public morals in the nature of a scandal-giving seduction, i.e., "public nuisance."[46]

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[46] If "to openly permit" traffic in obscenity is "seductive encouragement" and "potentially destructive" to "the period of growth of youth . . . when sensuality is being defined," and if it is the universal judgment of civilized nations that obscenity should be proscribed, how can any member of this Court give voice to the sentiment (even by way of suggestion) that the commercial

(This footnote is continued on the next page)

A nation whose public morals are preoccupied with sex is thought to be sick. The ultimate evil would be a society in which sex pictures, novels and magazines are available at every store, sex pictures on every marquee, sex movies in every theater, sex pictures in every art gallery, and sex language in every dialogue. To the extent that we have attained that status, we must acknowledge that we have lost control of public order and are closing the gap on the public morality of the ancient community of "Sodom and Gomorrah." The anti-social conduct of today's society becomes the socially acceptable conduct of the new community.. Recognizing that the evolution of man in civilized society is a slow-moving process, Amicus respectfully suggest that the individual members of this Court should examine and consider the suggestion that in the biblical days of Sodom and Gomorrah there must have been justices whose liberal views on public morality contributed to the destruction of those two cities. It matters not that in our present morally weakened society, there are many members of our "adult" community who may personally find it difficult to maintain high principles. In a civilized society hypocrisy is the compliment that vice pays to virtue.

During the past two years, the above stated concepts relating to the legitimate interest of government in controlling

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exhibition of obscenity to consenting adults is constitutionally permissible, without giving scandal and transgressing the "good behavior" requirement of Article III Section 1 of the federal constitution. So that this inquiry may be brought into clear focus, consider that proposition in the light of the subject matter currently being given wide distribution in the United States – such as "Animal Lover" appearing in Appendix C, pages 1-22.

and regulating "public morality" have been subjected to a constant and determined attack, under a claim that the Federal Constitution required that obscenity should be immune where commercially exhibited to consenting adults in an enclosed theater. This erroneous misconception, voiced by petitioner in his brief at page 21 and arising out of an interpretation placed on the recent decision of the United States Supreme Court in *Stanley v. Georgia*, 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243 (Apr. 7, 1969) was finally laid to rest on May 3, 1971, by this Court's decisions in *U.S. v. Reidel* 402 U.S. 351 and *U.S. v. Thirty-Seven (37) Photographs* 402 U.S. 363 and *U.S. v. Reidel*, Justice White, speaking for six members of the Court, said at page 815:

> "Section 1461 of Title 18, U.S.C., prohibits the knowing use of the mails for the delivery of obscene matter. The issue presented by the jurisdictional statement in this case is whether §1461 is constitutional as applied to the distribution of obscene materials to willing recipients who state that they are adults. The District Court held that it was not. We disagree and reverse judgment."

and at page 816:

> "In *Roth v. United States*, 354 U.S. 476 (1957), Roth was convicted under §1461 for mailing obscene circulars and advertising. The Court affirmed the conviction, holding that 'obscenity is not within the area of constitutionally protected speech or press' id., at 485, and that §1461, 'applied according to the proper standard for judging obscenity, do(es) not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited.' Id., at 492. Roth has not

been overruled. It remains the law in this Court and governs this case. Reidel, like Roth, was charged with using the mails for the distribution of obscene material. His conviction, if it occurs and the materials are found in fact to be obscene, would be no more vulnerable than was Roth's.

"Stanley v. Georgia, 394 U.S. 557 (1969), compels no different result. There, pornographic films were found in Stanley's home and he was convicted under Georgia statutes for possessing obscene material. This Court reversed the conviction, holding that the mere private possession of obscene matter cannot constitutionally be made a crime. But it neither overruled nor disturbed the holding in Roth. Indeed, in the Court's view, the constitutionality of proscribing private possession of obscenity was a matter of first impression in this Court, a question neither involved nor decided in Roth. The Court made its point expressly: 'Roth and the cases following that decision are not impaired by today's holding. As we have said, the states retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home.' Ibid. Nothing in Stanley questioned the validity of Roth insofar as the distribution of obscene material was concerned. Clearly the Court had no thought of questioning the validity of §1461 as applied to those who, like Reidel, are routinely disseminating obscenity through the mails and who have no claim, and could make none, about unwanted governmental intrusions into the privacy of their home. The Court considered this sufficiently clear to warrant summary affirmance of the judgment of the United States

District Court for the Northern District of Georgia rejecting claims that under Stanley v. Georgia, Georgia's obscenity statute could not be applied to book sellers. Gable v. Jenkins, 397 U.S. 592 (1970)."

In *U.S. v. Thirty-Seven (37) Photographs (supra)* the same majority of six came to an identical holding in a case involving the right of the Federal Government to seize obscene materials at the point of entry into this country and to institute a civil action in the federal courts to declare the subject matter to be contraband and subject to forfeiture. Mr. Justice White, writing for four members of the Court, held as follows, at page 833:

"We next consider Luros' second claim, which is based upon Stanley v. Georgia, supra. On the authority of Stanley, Luros urged the trial court to construe the First Amendment as forbidding any restraints on obscenity except where necessary to protect children or where it intruded itself upon the sensitivity or privacy of an unwilling adult. Without rejecting this position, the trial court read Stanley as protecting, at the very least, the right to read obscene material in the privacy of one's own home and to receive it for that purpose. It therefore held that § 1305(a), which bars the importation of obscenity for private use as well as for commercial distribution, is overbroad and hence unconstitutional.

"The trial court erred in reading Stanley as immunizing from seizure obscene materials possessed at a port of entry for the purpose of importation for private use. In United States v. Reidel, ante, we have today held that Congress may constitutionally prevent the mails from being used for distributing pornography.

> In this case, neither Luros nor his putative buyers have rights which are infringed by the exclusion of obscenity from incoming foreign commerce. By the same token, obscene materials may be removed from the channels of commerce when discovered in the luggage of a returning foreign traveler even though intended solely for his private use. That the private user under Stanley may not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce. Stanley's emphasis was on the freedom of thought and mind in the privacy of the home. But a port of entry is not a traveler's home. His right to be let aloneneither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search. Customs officers characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country . . . ."

Amicus emphasizes the relevance and importance of U.S. *v. Reidel* and *U. S. v. Thirty-seven (37) Photographs*, to the issues raised on this appeal and the major problem confronting this Nation insofar as the runaway nature of "public lewdness" on the public screen and elsewhere is concerned. (See pp 25-60 and Appendices A, and C thru "I".) It is now quite clear from those decisions that (1) actual prior restraints by way of court order, for a reasonable period of time in advance of a final determination of the legal issue by the trial court and after decision by the trial court are constitutional, and (2) no property interest

attaches to obscene materials which are possessed for commercial use and (3) the obscene materials can properly be made the subject of forfeiture as contraband.

In Amicus' view, it is inconceivable that all of the issues herein are not already decided by this Court's opinions in *Reidel* (supra) and Thirty-seven (37) Photographs (supra). The forty-eight (48) day period between seizure of the film "Blue Movie", at the time of the execution of the arrest warrant, and the final decision of the trial court, is well within the principles established in those cases.

(b) THERE IS A JUSTIFIABLE GOVERNMENTAL GROUND FOR THE REGULATION OF OBSCENITY BY STATES IN WHATEVER FORM IT MIGHT TAKE, EITHER CRIMINAL OR CIVIL.

The power of the State in the area of public morals is broad. In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 1 L.Ed2d 1169, 77 S.Ct. 1325 (June 24, 1957) decided on the same date as *Roth-Alberts*, 354 U.S. 476, Justice Frankfurter had the following to say concerning the power of states in this area, at Page 440:

> "In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that 'the primary requirements of decency may be enforced against obscene publications.' Id. 238 US at 716. And so our starting point is that New York can constitutionally convict appellants of keeping for sale the booklets incontestably found to be obscene. Alberts v. California, decided this day (1 L.ed2d 1948). The immediate problem then is whether New York can adopt as an auxiliary means of dealing with such obscene merchandising the procedure of Section 22-a.

"We need not linger over the suggestion that something can be drawn out of the Due Process Clause of the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice. See *Tigner v. Texas*, 310 US 141, 148, 84 L.ed1124, 1128, 60 S. Ct. 879, 130 ALR 1321. If New York chooses to subject persons who disseminate obscene 'literature' to criminal prosecution and also to deal with such books as deodands of old, or both, with due regard, of course, to appropriate opportunities for the trial of the underlying issue, it is not for us to gainsay its selection of remedies. Just as *Near v. Minnesota*, 283 US 697, 75 L.ed1357, 51 S.Ct. 625, supra, one of the landmark opinions in shaping the constitutional protection of freedom of speech and of the press, left no doubts that 'Liberty of speech, and of the press, is also not an absolute right,' 283 US at 708, it likewise made clear that the protection even as to previous restraint is not absolutely unlimited.' Id, 283 US at 716. To be sure the limitation is the exception; it is to be closely confined so as to preclude what may fairly be deemed licensing or censorship."

## 1. UNDER THE COMMON LAW, OBSCENITY, INDECENCY AND LEWDNESS WERE THE SUBJECT OF CRIMINAL SANCTIONS AS A PUBLIC NUISANCE.

Obscenity or indecent exhibitions of a nature to shock the public sense of decency were a public nuisance and indictable at the Common Law. *Crain v. State*, 3 Inc. 193 (1951). In Perkins on Criminal Law, Foundation Press, 1954, Professor Rollin Perkins states, at page 336:

> "Obscene or indecent exhibitions of a nature to shock the public sense of decency are also public nuisances and indictable at Common Law. This label includes not only obscene and indecent theatrical performances or side shows, but other disgusting practices such as letting a stallion to mares in the streets or some other public place . . . ."

For a modern application of this principle to some of the current problems which face this Nation, see *Bloss v. Paris Township*, 157 N.W.2d 260 (Apr. 1, 1968) holding the operation of an outdoor drive-in theater showing motion pictures which "dwell on the subject of sex and the human anatomy" to constitute a public nuisance. In *Bloss*, the Michigan Supreme Court stated the following, as to the nature of such public nuisances, at page 261:

> "What is a public nuisance? Joyce, Law of Nuisances, Section 7, page 15, defines a public nuisance, inter alia, as an act which offends public decency. Cited to Section 66, page 13, is the case of Hayden v. Tucker, 37 Mo. 214, in which it was held that the keeping of jacks and stallions within the immediate view of a private dwelling and a public highway is a nuisance

which equity will enjoin as a 'disgusting annoyance perpetually bringing the blush of shame to modesty and innocence.' The factual difference between the Hayden and the instant case, is that there involved was a display of equine and here pictures of the human frame, is not a distinction calling for a different conclusion as to the nuisance question."

Similarly, in *Cactus Corporation d.b.a. The Apache Drive-in v. State of Arizona, ex rel Murphy*, 480 P.2d 375 (Feb. 9, 1971), the Court of Appeals of Arizona, Division 2, recently affirmed the judgment of the trial court which permanently enjoined The Apache Drive-in Theater from displaying, showing or running a motion picture film, entitled "Lysistrata," or any other motion picture film of the same character, on the grounds that such activity is or would be a public nuisance as defined by A.R.S. Sect. 13-601, which defines, in part, a public nuisance as:

> "Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by a considerable number of persons . . . ."

"On March 4, 1971, the Georgia Supreme Court, in an unanimous decision, upheld the *inherent right* of law enforcement officials to enjoin the motion picture film "I Am Curious (Yellow)" as a public nuisance. In *Evans Theatre Corp. et al. v. Slayton, Dist. Atty. of Fulton County*, Ga. , 180 SE.2d 712 (Mar. 4, 1971), Presiding Judge Mobley, speaking for an unanimous court, said:

"We recognize the principle that equity will take no part in the administration of the criminal law. Code §

55-102. However, it has long been the rule in this State that the State has an interest in the welfare, peace, and good order of its citizens and communities, and that an action may be maintained at the instance of the prosecuting attorney to enjoin an existing or threatened public nuisance, even though the nuisance constitutes a crime punishable under the criminal laws. See: Lofton v. Collins, 117 Ga. 434 (3), 440 (43 SE 708, 61 LRA 150); Walter v. McNelly, 121 Ga. 114 (1), 115 (48 SE 718); Edison v. Ramsey, 146 Ga. 767 (92 SE 513); Dean v. State, 151 Ga. 371 (1) (106 SE 792, 40 ALR 1132); Gullatt v. Collins, 169 Ga. 538 (150 SE 825); Rose Theatre, Inc. v. Lilly, 185 Ga. 53 (1) (192 SE 866); Atkinson v. Lam Amusement Co., 185 Ga. 379 (195 SE 156); Forehand v. Moody, 200 Ga. 166 (36 SE2d 321); Norris v. Willingham, 204 Fa. 441 (50 SE2d 22); Thornton v. Forehand, 211 Ga. 568 (87 SE2d 865); Lee v. Hayes, 215 -Ga. 330, 331 (110 SE2d 624).

"The exhibition of an obscene motion picture is a crime involving the welfare of the public at large, since it is contrary to the standards of decency and propriety of the community as a whole. The welfare of the whole community is served by restraining the showing of such an obscene film.

"A court of equity was authorized to enjoin the exhibition of this obscene motion picture to the public."

In the *Evans Theatre Case*, this Court denied review. See Evans Theatre Corp. et al v. Slayton, Dist. Atty. of Fulton County, U.S. 30 L.Ed.2, 267 S.Ct. (Nov. 9, 1971). See also Judson v. Zurhorst, 30 Ohio Cir. 9, at Page 14, where the Ohio court said:

"There remains one contention for the granting of

this injunction on the facts alleged in the petition. That is on the alleged indecency of the pamphlet. The law does not favor obscenity or indecency.

"In a proper case instituted by one legally authorized to represent the public, the public exhibition of lewd pictures, immodest statuary, or immoral plays would unquestionably be enjoined, or otherwise suppressed; and for the same reason an obscene book or pamphlet is prohibited transit through the United States mail . . . ."

In *State of Ohio ex rel Keating v. A Motion Picture Film Entitled "Vixen" et al.*, 272 N.E.2d 137 (July 21, 1971), Amicus, as a private citizen, brought an abatement action against the exhibition of the motion picture "Vixen" in Cincinnati, Ohio (Hamilton County) under Section 3767.01 et seq., of the Ohio Revised Code, which authorizes a private party to bring such action. In that trial, the statute was upheld as against a claim of constitutional invalidity and the exhibition of the film at an indoor movie was held to be a public nuisance in Hamilton County. An appeal to the Court of Appeals, First Appellate District of Ohio, a similar attack was made against the statute on constitutional grounds, and as applied to the film itself. On July 20, 1970, the Court of Appeals, First Appellate District of Ohio upheld the constitutionality of the statute the principle involved and after trial *de novo*, declared the exhibition of the film to be a nuisance in the counties of Ohio in which it had jurisdiction. The Ohio Supreme Court affirmed the lower court's judgment and that matter is presently before this Court. On March 13, 1971, the Clerk of the Court was directed to obtain the film for the Court's viewing.

Section 3767.01 et seq., of the Ohio Revised Code was

recently before a 3-judge federal district court, convened under 28 U.S.C. Sections 2281-2284, upon a claim of the unconstitutionality of such statute. In that case, *Grove Press, Inc. et al. v. Anthony B. Flask*, 325 F. Supp. 574 (March 10, 1970), the court, in an unanimous decision (Celebreezze, Battisti and Green), upheld the constitutionality of the statute and its application in an abatement of the motion picture film, "I Am Curious (Yellow)" as a public nuisance. On July 6, 1970, Grove Press, Inc. filed its appeal in the United States Supreme Court. See *Grove Press, Inc. v. Flask*, October Term 1970, No. 360. As of this date, no action has been taken by this Court in this matter.

On the issue of whether indecency in the form of public lewdness in theatrical performances can be stopped in a civil action to abate a public nuisance in California, see *Weis v. Superior Court of San Diego County*, 30 Cal. App. 730, 159 P.464 (June 14, 1916). In *Weis*, that issue was before the District Court of Appeals, 2nd District, on a writ of prohibition. The District Attorney had commenced a civil action under Code of Civil Procedure, Section 731, to abate a theatrical performance on the ground that it was a public nuisance. The complaint alleged that under a concession granted by the Panama-California International Exhibition, the defendant was conducting upon the exposition grounds a public resort and place of amusement and entertainment, known as the "Sultan's Harem," in which certain women did make in the presence of the general public a public exhibition and exposure of their naked person and private parts, which performance was alleged to be indecent and offensive to the senses and a public nuisance. The California court dismissed the defendant's application for a preemptory writ holding the action was properly brought. At page 465, the

court said:

"While the acts here complained of clearly constitute a crime, *they also constitute a nuisance within the meaning of Section 3479 of the Civil Code*, which defines a nuisance as 'anything which is . . . indecent or offensive to the senses . . . so as to interfere with the comfortable enjoyment of life or property . . . .' (Emphasis ours.)

"And Section 3480 of the same Code defines a public nuisance as: 'One which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or danger inflicted upon individuals may be unequal.'

"Mr. Joyce in his work on Nuisances, Section 409, says: 'A disorderly and disreputable theater may be enjoined although a common nuisance.'

"To the same effect is Wood on Nuisances, Section 68, where it is said: 'A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or of the general good order and welfare of society, is a public nuisance. Under this head are included . . . obscene pictures and any and all exhibitions, the natural tendency of which is to pander to vicious . . . and disorderly members of society.'"

The *Weis* decision and rationale was cited with approval by the California Supreme Court in *People v. Lim*, 18 Cal.2d 872, 118 P.2d 472 (Nov. 27, 1941). In the *Lim* case, the California Supreme Court noted, at page 476:

"Similarly in Weis v. Superior, 30 Cal. App. 730, 159 P.464, it was held that the District Attorney of San Diego County was authorized under Code of Civil Pro-

cedure, Section 731, to enjoin the performance of a public exhibition which was shown to have been indecent, and thus within the statutory definition of public nuisances in Civil Code Section 3749 . . . . The courts have thus refused to grant injunctions on behalf of the State *except* where the objectionable activity can be brought within the terms of the statutory definition of public nuisance . . . ." (Our emphasis.)

The theatrical performance in *Weis* was in the nature of a "concession" on the Exposition grounds. The latter fact infers that the performance was a commercial activity and was not visible to the public's eye without the payment of an admission price. See the recent decisions of this Court in *U. S. v. Reidel* 402 U.S. 351 (May 3, 1971) *Thirty-Seven (37) Photographs* 402 U.S. 363 (May 3, 1971) which accord no constitutional protection to such commercial activities.

More recently, the California Supreme Court indicated *in dictum* that it presently adheres to the Common Law rule noted above. In *Burton v. Municipal Court of the Los Angeles Judicial District of Los Angeles County*, 68 Cal. 2d 684, 441 P.2d 281, 68 Cal. Rptr. 721 (June 6, 1968), a licensing case involving the exhibition at a theater of films claimed to be obscene, that Court cited with approval the Abatement Statute which codifies the principle employed by the Georgia Supreme Court. While denying the right of an *administrative board* to refuse a license on an *administrative* fact finding that the theater was a nuisance, the court pointed to the *judicial* Abatement Statute as a proper *procedural* employment of the "nuisance" concept. At page 726, the court said:

"[15]Section 103.31(b), under which the board may deny a permit '*for a business which has been or is a*

*public nuisance' is likewise defective.* The Civil Code defines a nuisance as 'Anything which is injurious to health, *or is indecent* or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any ** public park, square, street, or highway * * *.' (Civ. Code § 3479) *Section* 3480 defines a public nuisance as 'one which affects at the same time an entire community or neighborhood, or any number of persons * * * *.' *(See also, Pen. Code,* §§ 370, 371.)

"The provisions of Section 103.31(b) are no less vague than those of Sections 103.29(b) and 103.31(c) 1. *To permit a board to refuse to grant a license for the operation of a motion picture theater because in its subjective opinion the operation may be 'indecent or offensive to the senses* * * so as to interfere with the comfortable enjoyment of life or property of 'any considerable number of persons' obviously vests in the board an exorbitant quantum of discretion and *fails to meet the constitutional requirement of narrowly circumscribed standards.*

"[16] *We note in passing that the law provides ample methods for eliminating the existence of a nuisance by indictment or information, or by the bringing of a civil suit or an action for abatement.* (Civ. Code § 3491) It is, of course, within the *authority of a municipal legislative body to prescribe what constitutes a nuisance.* (Gov. Code, § 38771; City of Bakersfield v. Miller (1966), 65 Cal. 2d 93, 100, 48 Cal. Rptr. 889, 410 P.2d 393.) However, the policy board is not a legislative

agency, and *we are not concerned here with whether particular activity has been properly defined as a nuisance but only with whether an administrative board may refuse to grant a permit to petitioners because in its subjective opinion the business which they operate 'has been or is a public nuisance.'"* (Our emphasis.)

In *People ex rel Hicks v. "Sarong Gals"* 103 Cal. Rptr. 414 (Aug. 3, 1972) the Court of Appeal in California was faced with a case involving subject matter which differed from the type of conduct herein, only, in that there the "lewdness" was "live," rather than "filmed." In upholding the application of the Red Light Abatement Law to abate, as a nuisance, continuing acts of lewdness sans evidence of prostitution, the Court held at page 417:

"The behavior described in the instant case amounts purely and simply to an exhibition calculated to arouse latent sexual desires and release the inhibitions of the viewers rather than a mode of expressing emotion and dramatic feeling by the performer.

"While our Supreme Court has held that amusement and entertainment as well as the expression of ideas are encompassed within the right of freedom of speech (In re Giannini, *supra*, 69 Cal.2d 563, 569, 72 Cal. Rptr. 655, 446 P.2d 535; Weaver v. Jordan, 64 Cal.2d 235, 242, 49 Cal.Rptr. 537, 411, P.2d 289), entertainment value per se does not give an activity redeeming social importance. Presumably, the Romans of the First Century derived entertainment from witnessing Christians being devoured by lions. Given the right audience, the spectacle of a man committing an act of sodomy on another man would provide entertainment value. However, neither this spectacle nor the activities described in

the instant case are invested with constitutionally protected values merely because they entertain viewers. However chaotic the law may be in this field, no court has as yet adopted such an extreme result.

"Public display such as those described above are within the type of public nuisances traditionally within the power of the state to regulate and prohibit. They involve no significant countervailing First Amendment consideration. Attempts to present this type of commercialized lewdness under the mantle of the First Amendment under a concept of communication of ideas stretches reason.

"We hold that the "entertainment" described in the instant case is lewd and, therefore, not afforded the protection of freedom of speech under the First Amendment. The acts of the "entertainers" or "dancers" in the instant case were purely and simply obscene acts performed for the purpose of inciting the sexual desires and imaginations of a group of randy, beer drinking patrons. As such, these acts amount to conduct not protected by the First Amendment. The prevention of these acts does not hinder the market place of ideas or freedom to distribute information and opinion."

In answering arguments that the legislature did not intend the statute to encompass that type of activity, the court said at page 416:

"Defendants contend that when the Red Light Abatement Law was enacted (1913), the Legislature did not have in mind the type of activity described above.[3]

"This is apparently true. History does not record the existence of any topless-bottom-less bars offering the type of entertainment described herein in 1913.

Western folklore has it that prostitutes were good-hearted wenches who bedded their customers with no shilly-shallying around, nursed the sick in times of emergency, eventually married homesteaders and became pillars of the community. However, even prior to 1913, the exploitation of sexual desires for profit was apparently recognized as a social problem. Thus the Legislature specifically included lewdness as one of the grounds of the court's power to curb a public nuisance. In People v. Bayside Land Co., 48 Cal.App. 257, 191 P. 994, the court held that lewdness – even though no incidents of prostitution or assignation had occurred – came within the Red Light Abatement Law."

Carried as a footnote, the Court also made the following observation:

"It can be argued with equal persuasion that the authors of the First Amendment to the United States Constitution would be more than a trifle shocked were they to discover some of the more bizarre behavior now protected by that amendment's lofty concept of freedom of speech."

## CONCLUSION

For all of the foregoing reasons, the judgment of the Court below, should be affirmed.

Respectfully submitted

Charles H. Keating, Jr.
Amicus Curiae

## APPENDIX A

## TIME-MOTION STUDY* OF FILM "UN CHANT D'AMOUR"

A-1 thru A-15

*Landau v. Fording*, 245 Cal. App.2d 820, 54 Cal. Rptr. 177, decided Oct. 24, 1966, wherein the Court of Appeal of California, First Appellate District, affirmed the trial court judgment that "Un Chant D'Amour" was obscene. Hearing denied in California Supreme Court on Dec. 21, 1966.

A-16 thru A-22

*Landau v. Fording*, 388 U.S. 456, 18 L.Ed.2d 1317, 87 S.Ct. 2109, rehearing denied 389 U.S. 889, 19 L.Ed.2d 199, 88 S.Ct. 16 (June 12, 1967) wherein the United States Supreme Court granted a writ of certiorari and affirmed (5-4) the judgment of the Court of Appeal of California that "Un Chant D'Amour" was obscene.

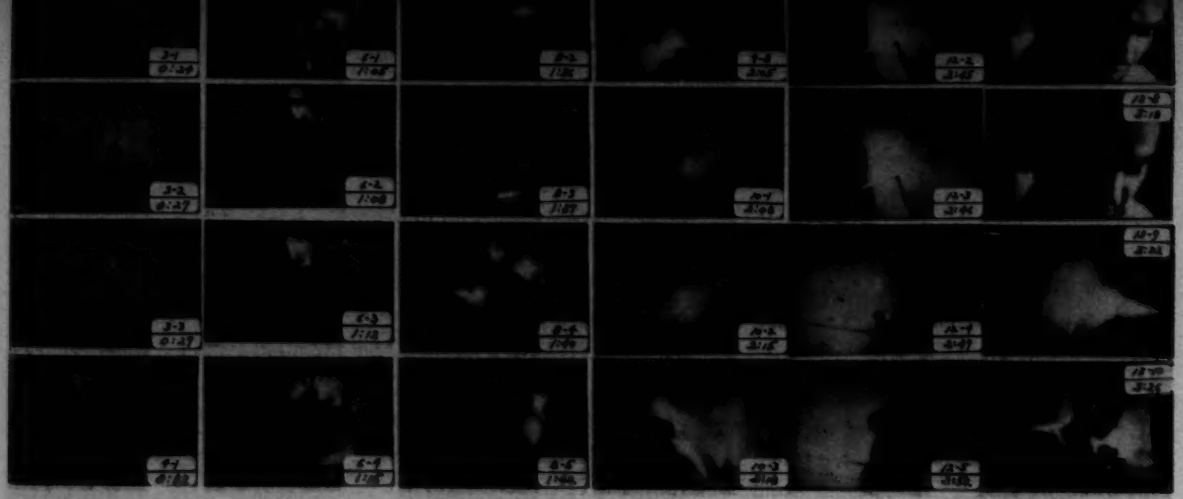
A-23

*A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner.

"UN CHANT D'AMOUR"
(Part 1 of 7 Parts)

245 Cal. App. 2d, 820, 54 Cal. Rptr. 177 (Dec. 21, 1966) and affirmed on the merits by U.S. Supreme Court in 388 U.S. 456 (June 12, 1967) See Appendix A, herein, at pp. 16-23.

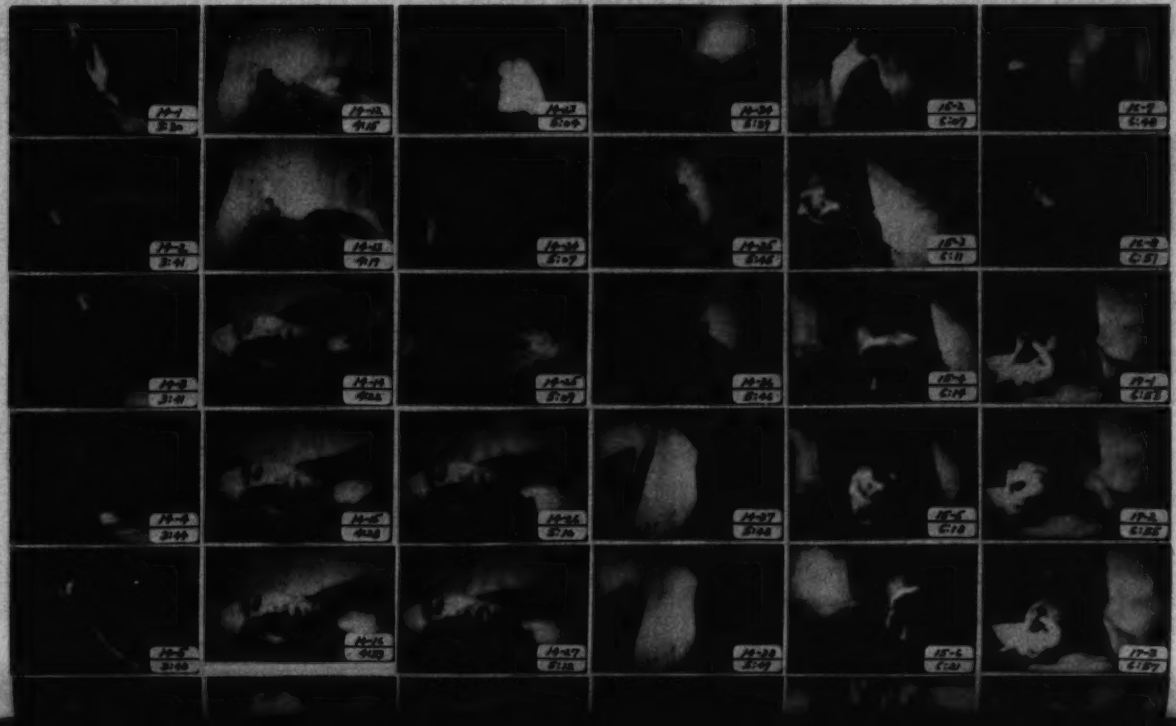




Credits 1-1 thru 1-2; guard walks outside prison 2-1 thru 2-5; prisoner's hand in cell window attempts to pass garland to inmate in adjoining cell 3-1 thru 3-3; guard outside prison 4-1; Prisoner 1 paces in his cell 5-1 thru 5-7; Prisoner 2 in adjoining cell listens and knocks on wall 6-1 thru 6-7; Prisoner 1 continues to pace 7-1 thru 7-3; Prisoner 2 knocks on cell wall 8-1 thru 8-5; Prisoner 1 listens and places right hand on tattoed girl on his left shoulder 9-1 thru 9-8; closeup of Prisoner 2's face 10-1 thru 10-4; Prisoner 1 paces in cell with hand on tattoo 11-1 thru 11-5; Prisoner 2 places straw through hole in the wall and blows smoke into adjoining cell cell 12-1 thru 12-6; closeup of Prisoner 1 with hand on tattoed girl 13-1 thru 13-10.

"UN CHANT D'AMOUR"
(Part 2 of 7 Parts)

Held to be hard core pornography in Landau v. Fording 245 Cal. App. 2d, 820, 54 Cal. Rptr. 177 (Dec. 21, 1966) and affirmed on the merits by U.S. Supreme Court in 388 U.S. 456 (June 12, 1967) See Appendix A, herein, at pp. 16-23.



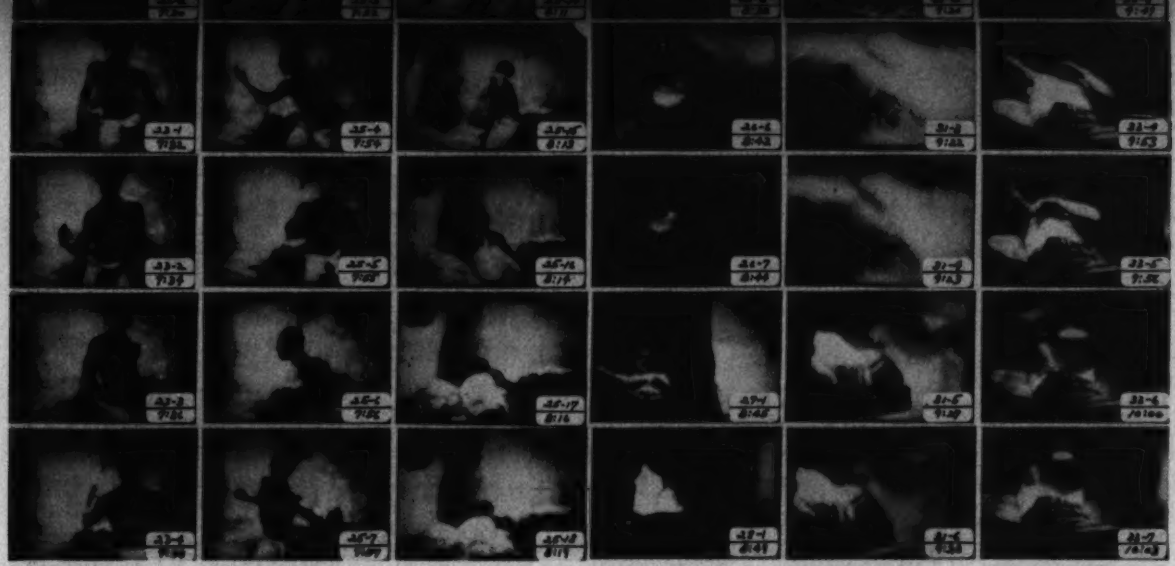


Prisoner 2 smokes in his cell 14-1 thru 14-10; places chewing gum over hole in wall 14-11 thru 14-13; lies down on cot 14-14 thru 14-16; places hand in area of genitals 14-17 thru 14-25; closeup of Prisoner 2's face 14-26 thru 14-28; closeup of hand in area of genitals 14-9 thru 14-33; Prisoner 2 stands next to common wall 14-34 thru 14-38; with erect penis against it 14-39; and beats on wall with his fists 14-40 thru 14-43; Prisoner 1 dances with hand on tattoo 15-1 thru 15-6; guard walks in corridor outside cell and looks into cell 16-1 thru 16-8; prisoner lying on cot 17-1 thru 17-3; guard walks to another cell and looks in 18-1 thru 18-3; nude Prisoner 3 inside is masturbating 19-1 thru 19-3.

"UN CHANT D'AMOUR"
(Part 3 of 7 Parts)

Held to be hard core pornography in Landau v. Fording 245 Cal. App. 2d, 820, 54 Cal. Rptr. 177 (Dec. 21, 1966) and affirmed on the merits by U.S. Supreme Court in 388 U.S. 456 (June 12, 1967) See Appendix A, herein, at pp. 16-23.





Nude Prisoner 3 masturbates 19-4 thru 19-6; guard watches 20-1; Prisoner 3 exposes himself to guard 21-1; guard walks to another cell 22-1 thru 22-2; negro Prisoner 4 is dancing and masturbating 22-1 thru 23-7; guard watches 24-1; negro Prisoner 4 continues to dance 25-1 thru 25-14; throws himself on bed and continues autoeroticism 25-15 thru 25-20; guard walks to cell of Prisoner 1 and looks in 26-1 thru 26-7; prisoner lies on bed manicuring toes 27-1; guard watches 28-1; closeup of Prisoner 1's feet 29-1 thru 29-4; guard watches 30-1; Prisoner 1 puts lefthand in area of genitals 31-1 thru 31-4; closeup of Prisoner 2 and Prisoner 1 31-3 thru 31-4, and 31-5 thru 31-6; closeup of Prisoner 2's face in apparent orgasm 31-7 thru 31-9; guard watches 32-1; Prisoner 2 removes hand from genital area and brings it to his face.

"UN CHANT D'AMOUR"
(Part 4 of 7 Parts)

Held to be hard core pornography in Landau v. Fording 245 Cal. App. 2d, 820, 54 Cal. Rptr. 177 (Dec. 21, 1966) and affirmed on the merits by U.S. Supreme Court in 388 U.S. 456 (June 12, 1967) See Appendix A, herein, at pp. 16-23.





Prisoner 2 on bed 33-8 thru 33-14, hears noise and looks to wall 33-16 thru 33-18; guard walks to adjacent cell and looks in 34-1 thru 34-3; closeup of Prisoner 2 with face against wall 35-1 thru 35-2; closeup of Prisoner 1's face 36-1 thru 36-2; Prisoner 2 kisses wall 37-1 thru 37-2; Prisoner 1 takes straw and places it through hole in wall 38-1 thru 38-5; Prisoner 2 lights cigarette and blows smoke thru straw 39-1 thru 39-8; Prisoner 1 inhales smoke 40-1 thru 40-6; passing of smoke activity continues 41-1 thru 46-1; guard walks back to cell of Prisoner 1 and looks in 47-1 thru 47-3; closeup of Prisoner 1's face 48-1 thru 48-2; guard watches 49-1; closeup of Prison-1 and 2 in their cells 50-1 thru 52-1.

"UN CHANT D'AMOUR"
(Part 5 of 7 Parts)

Held to be hard core pornography in Landau v. Fording 245 Cal. App. 2d, 820, 54 Cal. Rptr. 177 (Dec. 21, 1966) and affirmed on the merits by U.S. Supreme Court in 388 U.S. 456 (June 12, 1967) See Appendix A, herein, at pp. 16-23.





Prisoner 1 observes guard watching and gestures defiance 52-2 thru 54-4; guard outside cell; closeup of hand attempting to grasp swinging garland 56-1 thru 56-8; fantasy scene beteeew two male prisoners 57-1 thru 58-2; closeup of guard's face showing anger 59-1 thru 59-5; guard enters cell of Prisoner 2 with gun drawn 59-6 thru 59-9 and takes off his belt 59-10 thru 59-14; guard and Prisoner 2 face each other 60-1 thru 63-2; guard beats Prisoner 2 with belt 63-3 thru 65-5; Prisoner 1 listens in adjoining cell 66-1 thru 66-3; Prisoner 2 laughs 67-1 thru 67-4.

"UN CHANT D'AMOUR"
(Part 6 of 7 Parts)

held to be hard core pornography in Landau v. Fording 245 Cal. App. 2d, 820, 54 Cal. Rptr. 177 (Dec. 21, 1966) and affirmed on the merits by U.S. Supreme Court in 388 U.S. 456 (June 12, 1967) See Appendix A, herein, at pp. 16-23.





Fantasy scene with Prisoner 2 chasing Prisoner 1 68-1 thru 68-29; closeup of guard in cell of Prisoner 2 69-1 thru 69-2; closeup of hand trying to reach swinging garland 70-1 thru 70-4; Prisoners 1 and 2 exchange smoke inhalations 71-1 thru 71-5 and kiss 71-5 thru 71-6; embrace of two male nudes 72-1 thru 72-4; hand reaches to genital area and is grasped by another hand 73-1 thru 73-4; closeup of guard in cell of Prisoner 2 74-1 thru 74-2; Prisoner 2 lies on cot 75-1 thru 75-5; guard watches 76-1 thru 76-2; return to fantasy scene, Prisoners 1 and 2 outdoors 77-1 thru 77-7.

"UN CHANT D'AMOUR"
(Part 7 of 7 Parts)

Held to be hard core pornography in Landau v. Fording 245 Cal. App. 2d, 820, 54 Cal. Rptr. 177 (Dec. 21, 1966) and affirmed on the merits by U.S. Supreme Court in 388 U.S. 456 (June 12, 1967) See Appendix A, herein, at pp. 16-23.





Prisoner 2 catches Prisoner 1 and carries him on his shoulders and lays him on the ground 77-8 thru 77-18; Prisoner 2 unbuckles Prisoner 1's belt 77-20 thru 77-21; shift to guard and Prisoner 2 inside cell 78-1 thru 80-1; hand grasping for swinging garland 81-1 thru 81-3; fantasy scene of fellatio between Prisoners 1 and 2 82-1 thru 82-22; shift to guard inside Prisoner 2's cell 83-1; Prisoner 2 unbuckles belt of Prisoner 1 in fantasy scene 84-1; inside Prisoner 2's cell guard places barrel of gun in Prisoner 2's mouth 85-1 thru 85-7; orgasm of guard 85-8 thru 85-9; hand tries to reach swinging garland at cell window 87-1 thru 87-2; Prisoner 2 knocks on cell wall to Prisoner 1 88-1 thru 88-3; guard walks outside prison 89-1; prisoner's hand in cell trying to reach garland being passed from adjacent cell window 90-1 thru 90-3. The End 91-1.

Saul LANDAU, Plaintiff and Appellant,

v.

Addison FORDING, Chief of Police, Berkeley, California, Earl Borgfeld, Director, Special Investigations Bureau of the Police Department of Berkeley, California, the Police Department of the City of Berkeley, California, and the City of Berkeley, California, Defendants and Respondents.

Civ. 22930.

District Court of Appeal, First District, Division 2, California.

Oct. 24, 1966.
Hearing Denied Dec. 21, 1966.

Action to determine whether film was obscene. The Superior Court, Alameda County, George W. Phillips, Jr., J., entered judgment based on finding that film was obscene and an appeal was taken. The District Court of Appeal, Taylor, J., held that film "Un Chant d'Amour" was obscene within Penal Code definition and excluded from constitutional guarantees of freedom of speech and press.

Affirmed.

1. Constitutional Law ⇐90

While motion pictures, like other forms of expression are within ambit of constitutional guarantees of freedom of speech and of press, obscenity is not subject to those guarantees.

2. Evidence ⇐508, 516, 571(1)

Expert testimony was admissible to assist in trial court's determination of contemporary community standards as well as artistic merit and social importance of allegedly obscene film, and trial court was not required to base its conclusion solely on viewing of film. West's Ann.Pen.Code, § 311(a).

3. Constitutional Law ⇐90

Constitutional guarantees of free speech and free press are not confined to expression of ideas that are conventional or shared by majority.

4. Constitutional Law ⇐90

Constitutional protection afforded does not mean that visual impact of motion picture as distinguished from other media can be disregarded; films are obviously different from other forms of expression.

5. Constitutional Law ⇐90

Because of nature of medium, motion picture of sexual scenes may transend bounds of constitutional guarantee long before frank description of same scenes in written word.

6. Constitutional Law ⇐90

That allegedly obscene film was written and directed by a writer of renown did not settle question of whether film contained sufficient artistic merit to be within constitutional protection.

7. Constitutional Law ⇐90
Obscenity ⇐5

Film "Un Chant d'Amour" was obscene within Penal Code definition and excluded from constitutional guarantees of freedom of speech and press. West's Ann.Pen.Code, § 311(a).

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Johnston & Platt, Neil F. Horton, Oakland, Albert M. Bendich, Berkeley, Marshall W. Krause, Staff Counsel, American Civil Liberties Union of Northern California, San Francisco, for appellant.

Robert T. Anderson, Robert P. Berkman, Berkeley, for respondents.

TAYLOR, Justice.

The only question presented on this appeal is whether the trial court properly found that "Un Chant d'Amour," a film written and directed by Jean Genet, was obscene within the meaning of section 311, subdivision (a), of the Penal Code and, therefore, excluded from the constitutional guarantees of freedom of speech and of the press.

The pertinent facts are not in dispute. Appellant, Saul Landau, was authorized by the New York distributor to exhibit the film in the San Francisco Bay Area. Ap-

pellant shared the proceeds derived from such exhibitions with the San Francisco Mime Troupe, an unincorporated association. Under his agreement with the New York distributor, appellant was not entitled to exhibit the film at commercial movie houses catering to a general movie audience.

Prior to the instant proceeding, appellant had exhibited the film in Santa Barbara (before an audience comprised mainly of people from the Center for the Study of Democratic Institutions), in San Francisco at several private showings, at San Francisco State College, in several art movie houses in San Francisco, and in Berkeley at Stiles Hall, the University Y.M.C.A. After appellant sought to show the film a second time in Berkeley, his agent was advised by respondent Bergfeld, the Director of the Special Investigations Bureau of the Police Department, that the next time the film was exhibited in Berkeley, it would be confiscated and all persons responsible arrested. In so advising the agent of appellant, respondent Bergfeld acted as the agent of the Berkeley Police Department headed by respondent Fording.

Thereafter, appellant instituted this action for declaratory relief. At the trial of the action, the trial court, in order to determine the artistic value and social importance of the film, admitted the testimony of seven expert witnesses called by appellant [1] as well as its own expert witness [2] over the repeated objections of respondents who chose not to present any evidence, but argued that the court had to base its conclusions on the film alone. All of appellant's witnesses had different views as to the theme of the film, and while contending that it was not hard-core pornography, they agreed that the film should not be shown over television or in commercial motion picture theatres.

The trial court twice viewed the film and found that to the average person applying contemporary community standards, the predominant appeal of the film as a whole was to prurient interests, i. e., a shameful and morbid interest in nudity and sex, substantially beyond customary limits of candor in the description or representation of such matters. The court further found that the film explicitly and vividly revealed acts of masturbation, oral copulation, the infamous crime against nature (sodomy), voyeurism, nudity, sadism, masochism and sex and that it was "nothing more than cheap pornography calculated to promote homosexuality, perversion, and morbid sex practices," that it fell "far short of dealing with homosexuality, perversion, masturbation or sex from the scientific, historical or critical point of view," was completely lacking in the exposition of any ideas of social importance, and had no value as art or otherwise to give it redeeming social importance and thus obtain the benefit of the constitutional guarantees.

Accordingly, the court concluded that: the film was obscene within the meaning of section 311, subdivision (a), of the Penal Code; therefore, any exhibition or showing thereof would be in violation of section 311.2 of the Penal Code, and any person showing the film would not be able to claim as a defense that the exhibition was in aid of legitimate scientific or educational purposes within the meaning of section 311.8 of the Penal Code. This appeal

1. The witnesses for appellant were: James Kerans, lecturer on dramatic literature and theory of the University of California, Berkeley; Irving Sarnf, director of film programming for television station KQED; Mark Linenthal, assistant director of the Poetry Center of San Francisco State College; Jackson Burgess, novelist, film critic and professor of English at the University of California, Berkeley; Susan Sontag, novelist and film critic; Jan Mariniissen, rehabilitation secretary of the American Friends Service Committee; Dr. Bernard L. Diamond, professor of Criminology and Law at the University of California, Berkeley.

2. The court called as its own expert witness Dr. Charles W. Morrifield, professor of Social Science and the head of the Social and Behavorial Sciences at California State College, Hayward.

is from the judgment entered in favor of respondents.

[1] While motion pictures, like other forms of expression, are within the ambit of the constitutional guarantees of freedom of speech and of the press (Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098), obscenity is not subject to those guarantees (Roth v. United States, (Alberts v. State of California), 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498).

Section 311, subdivision (a), of the Penal Code provides: "'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

The statute was the codification of the definition of obscenity announced by the U. S. Supreme Court in Roth v. United States, supra (Zeitlin v. Arnebergh, 59 Cal.2d 901, 918–919, 31 Cal.Rptr. 800, 383 P.2d 152). The section, in substance, prohibits "hard-core" pornography (Zeitlin v. Arnebergh, supra, at p. 919, 31 Cal.Rptr. 800, 383 P.2d 152). The U. S. Supreme Court has not yet determined whether Roth and the subsequent cases are limited to "hard-core" pornography.[3] (Manual Enterprises v. Day, 370 U.S. 478, 489, 82 S.Ct. 1432). In its most recent opinion dealing with a film, the U. S. Supreme Court said: "We would reiterate, however, our recognition in Roth that obscenity is excluded from the constitutional protection only because it is utterly without redeeming social importance,' and that 'the portrayal of sex, e. g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.' Id. 354 U.S., at 484, 487, 72 S.Ct. at 1310. It follows that material dealing with sex in a manner that advocates ideas, Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance." (Jacobellis v. State of Ohio, 378 U.S. 184, at p. 191, 84 S.Ct. at p. 1680.)

The Jacobellis opinion also indicated that the applicable contemporary community standard is not that of the local community where the case arises, but a national standard (supra, pp. 192–195, 84 S.Ct. 1676). The most recent decisions of the U. S. Supreme Court affirm the requirement that the elements of obscenity defined in Roth must coalesce, that there will be no balancing of "social importance" against the other elements (Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413, 419, 86 S.Ct. 975), and announced a new doctrine, namely, that evidence that material was commercially exploited for the sake of prurient appeal to the exclusion of all other values would justify the conclusion that the material was utterly without redeeming social importance (Ginzburg v. United States, 383 U.S. 463, 470–473, 86 S.Ct. 969, 16 L.Ed.2d 31; Mishkin v. State of New York, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56), Ginzburg and Mishkin indicating that apart from the nature of the

[3] Significantly, only in a few cases, notably Manual Enterprises v. Day, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639; Jacobellis v. State of Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793, and Memoirs of a Woman of Pleasure v. Attorney General of Com. of Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1, was the court ever required to apply its standards to the materials in question. In all of the other cases, because the issue before the court was the constitutionality of a particular statute, the issue of the obscenity of the material itself was either assumed or not discussed.

material, the conduct of the disseminator and the commercial context in which the dissemination occurs are significant.

[2] We first dispose of respondents' contention that the trial court erred in admitting the testimony of the expert witnesses and in failing to base it conclusions solely on the viewing of the film. The question here presented is not one of fact alone but is mixed with a determination of law (Zeitlin v. Arnebergh, 59 Cal.2d 901 at p. 910, 31 Cal.Rptr. 800, 383 P.2d 152). The court must make an independent judgment as to whether the *material involved is constitutionally protected* (Jacobellis v. State of Ohio, supra, 378 U.S. p. 190, 84 S.Ct. p. 1679). In almost every field of the law, expert testimony is permitted on subjects concerning which the judge or administrator has no specialized competence. So here, the lower court properly received evidence to assist in the determination of contemporary community standards as well as the artistic merit and social importance of the film (Smith v. People of State of California, 361 U.S. 147 at pp. 157, 166–167, 80 S.Ct. 215, 4 L.Ed.2d 205).

The principal question is whether "Un Chant d'Amour" satisfies the test of obscenity established by our statute and the decisions of the U. S. Supreme Court. Before exploring the "dim and uncertain" line that often separates obscenity from a constitutionally protected expression (Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66, 83 S.Ct. 631, 9 L.Ed.2d 584), we give a description of the film which was viewed in its entirety by the justices of this court.

"Un Chant d'Amour" is an 8 mm. silent film of about 30 minutes' duration made in the style of the short silent films of the 1920's and apparently deliberately ambiguous. No music or text accompanies the film. The actors are professionals. The picture was made with artificial lighting on autochromatic film which is blind to red so that almost all of the grays are eliminated. The resultant strong contrasts between dark and light create a particularly visual impact.

The setting is an unnamed prison cell block in an unnamed place. The principal characters are a guard and four prisoners. At the outset, the guard is walking outside the prison walls. Each prisoner is alone in his cell engaging in various acts of self-love and masturbation. The prisoners are also shown communicating with each other by knocking on the walls and by the passage of a straw through a hole in the thick wall between the cells, and the blowing of smoke through a straw. Two of the prisoners are clearly involved in a homosexual relationship. The guard in the course of his duties looks into each of the individual cells through peep holes and observes the prisoners. Their acts of sexual perversion and particularly the conduct of one hairy-chested prisoner arouses the guard's voyeuristic and latent homosexual tendencies. The film reaches a climatic ending in a sadistic beating of the hairy-chested prisoner by the algolagnic guard. In the last scene, the guard is again walking outside the prison wall.

In the last half of the film, the realistic scenes in the prison are interspersed with three series of brief recurring fantasy scenes that may or may not be the fantasy of some or only one of the characters. In the first series, two hands emerge from their individual barred cell windows and one hand attempts unsuccessfully to throw a garland of flowers to the other. Toward the end of the film, the garland is caught. In the second series of fantasy scenes (most likely those of one or both of the prisoners who are homosexually involved with each other), the prisoners are playing together in a romantic sunlit wood. During the third series (most likely those of the guard during the beating), two male heads are seen passionately kissing; two male torsos appear in various positions depicting fellatio, sodomy and oral copulation. The fantasy scenes increase in intensity during the film. At several points, the fantasy and the reality appear to merge; for example, in one scene, a prisoner puts on his jacket; he is next seen wearing the jacket in the

sentimental woods fantasy. The portrayals of sexual perversion occupy in excess of half of the footage of the film.

It should be readily apparent from the preceding description that the film goes far beyond customary limits of candor in offensively depicting certain unorthodox sexual practices and relationships. Thus, the instant film is clearly distinguishable from Manual Enterprises v. Day, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639,[4] and similar cases such as Times Film Corp. v. City of Chicago, 355 U.S. 35, 78 S.Ct. 115, 2 L.Ed. 2d 72, and One, Inc. v. Olesen, 355 U.S. 371, 78 S.Ct. 364, 2 L.Ed.2d 352.[5]

[3] At the outset, we wish to make it patently clear that our conclusion is not based on the particular relationships depicted in "Un Chant d'Amour." We recognize that the constitutional guarantee is not confined to the expression of ideas that are conventional or shared by a majority (Kingsley Pictures Corp. v. Regents, 360 U.S. 684 at pp. 689, 705, 79 S.Ct. 1362, 3 L.Ed.2d 1512). We think there is no question that there could be an effective and dramatic film about homosexuality and sadism in prisons unaccompanied by any obscene matters (Kingsley, supra) or that a film unquestionably obscene under the applicable standard may not be so when limited to an audience of specialists (cf. United States v. 31 Photographs, Etc. (S.D.N.Y. 1957) 156 F.Supp. 350).

But from the fact that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, "it does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. * * * Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems" (Burstyn, supra, 343 U.S. at pp. 502–503, 72 S.Ct. at p. 781).

[4] Furthermore, we think that the constitutional protection afforded does not mean that the visual impact of a motion picture as distinguished from other media can be disregarded. Films are obviously different from other forms of expression (Freedman v. State of Maryland, 380 U.S. 51, at p. 61, 85 S.Ct. 734, 13 L.Ed. 649). The significance of the motion picture medium is due to the technological features of the particular medium. The unique combination of sight and sound that characterizes a motion picture makes the ideas presented by movies comprehensible to a larger audience than is the case in any other medium except television (see materials cited in 60 Yale L.J., 696, fns. 27 and 28, at pp. 707–708, and 42 Cal.L.Rev., 122, fn. 53, at p. 128). Even in the absence of sound, movies assure a high degree of attention and retention. The focusing of an intense light on a screen and the semi-darkness of the room where distracting ideas and suggestions are eliminated contribute to the forcefulness of movies and their unique effect on the audience (60 Yale L.J., supra, at p. 708).

[5] Because of the nature of the medium, we think a motion picture of sexual scenes may transcend the bounds of the constitutional guarantee long before a frank description of the same scenes in the written word. We cannot here disregard the potent visual impact of the movie in depicting acts of male masturbation, fellatio, oral copulation, voyeurism, nudity, sadism and sodomy without any clear reference or relation to a dominant theme. We conclude that measured in terms of the sexual interests of *its intended and probable recipient group* (Mishkin v. New York, 383

4. Wherein the court held that offensive material admittedly intended to appeal to homosexuals was not obscene because the representation and descriptions did not go "substantially beyond customary limits of candor" (at p. 486, 82 S.Ct. at p. 1436).

5. Both of these were per curiam reversals after Roth. The nature of the materials is described by brief quotations from the lower court opinions in Zeitlin v. Arnebergh, supra, footnote 22, 59 Cal. 2d at page 915, 31 Cal.Rptr. 800, 383 P. 2d 161.

U.S. 502, 509-510, 86 S.Ct. 958, 16 L.Ed.2d 56) or to the average person, applying contemporary standards, the predominant appeal of the film taken as a whole is to the prurient interest.[6]

We turn next, therefore, to the more difficult and delicate question of whether there is present in the film any matter of social importance (including artistic merit) that would, as appellant argues, recover for the film its protection as a constitutionally protected utterance (Zeitlin v. Arnebergh, supra, 59 Cal.2d at p. 920, 31 Cal.Rptr. 800, 383 P.2d 152).

[6] The fact that the writer, director and producer of the film, Jean Genet, is a French writer of renown does not, as appellant argues, settle the crucial question of whether the film contains sufficient artistic merit. Great artists can create the type of "hard-core" pornography proscribed by our statute. Often, as in Zeitlin v. Arnebergh, supra, the technical excellence and artistic merit redeem the work despite its obscene content. Unfortunately, that is not the case here. Even appellant's own literary witness admitted that the film was made at the beginning of Genet's career as a playwright and is a transitional work in his development from a novelist into a dramatist. The witness also testified that "Un Chant d'Amour" is much less complicated than his later works and is not easily recognizable as a work of Genet. The artistic merit of Genet's other works does not provide a carte blanche when he chooses to venture into the fields covered by the film. As we indicated above, the technical aspects of the motion picture medium simply increase the burden on the artist and add a different and far more sensitive dimension.

The fact that there is no text or dialogue accompanying the film contributes to its ambiguity and the absence of a dominant theme. We think it a significant indication of the film's failure that none of the witnesses produced could agree on its dominant theme.[7] We note that in Jacobellis, supra, in holding that the film "The Lovers" was not obscene, the court had no problem of ascertaining the theme or plot of the film. The same clear indication of a particular story line along with the artistic necessity of the objectionable scenes was present in the decisions upholding the film "Lady Chatterley's Lover" (Kingsley, supra) and "Anatomy of a Murder" (Columbia Pictures Corporation v. City of Chicago (N.D. Ill.1959) 184 F.Supp. 817). A plot and some attempt at character development was apparently also clearly discernible in Times Film Corporation v. City of Chicago, supra, and One, Inc. v. Olesen, supra).

Here the erotic scenes recur with increasing intensity and without direction toward any well-defined, wholesome idea, through scene after scene. The various sexual acts are graphically pictured or emphatically suggested with nothing omitted except those sexual consummations which are plainly suggested but meaningfully omitted and thus by the very fact of omission emphasized. If the film was intended as an artistic portrayal, it clearly failed in its endeavor. The fantasy portions of the film portray purely physical acts of increasing intensity without any contribution to character or plot development.[8] Significantly,

6. We note that appellant concedes that the U. S. Court's rejection of an "average man" prurient appeal test in Mishkin undercuts a substantial portion of his argument.

7. Some suggested the effect of isolation and imprisonment upon both prisoners and guards; another, an attempt at penal improvement; others, a comment on the isolated human condition and the difficulties of human contact.

8. The presentation of most of the erotic material in the fantasy scenes is significant. As one eminent authority, the noted anthropologist, Margaret Mead, stated: "We may define pornography, cross-culturally, as words or acts or representations that are calculated to stimulate sex feelings independent of the presence of another loved and chosen human being. *The character of the daydream as distinct from reality is an essential element in pornography.* True, the adolescent

it was the very absence of such treatment of sex that led our Supreme Court to conclude that "Tropic of Cancer" was not the hard-core pornography proscribed by section 311, subdivision (a) of the Penal Code (Zeitlin v. Arnebergh, supra, 59 Cal.2d p. 922, 31 Cal.Rptr. p. 813, 383 P.2d p. 165.) In our opinion, the production does nothing more than depict a number of disjointed scenes treating sex in a shocking, morbid and shameful manner and is devoid of artistic merit.

However, as Kingsley pointed out, the constitutional guarantee does not extend only to materials artistically expressed. We are left, therefore, with the question of whether the film contains any other concepts of redeeming social importance. As indicated, the fact that the film is silent and there is no text or explanation to accompany it, contributes to its ambiguity. Precisely because of this ambiguity and lack of ascertainable dominant theme, the film is clearly not a documentary of prison life or a scientific study of prison psychology. While some of appellant's witnesses indicated that the film might reflect on the need for prison reform, all agreed that it should not be shown on television or in a commercial motion picture theatre except possibly with other documentaries.[9] Dr. Diamond stated: "Like anything else, if it were handled indiscriminately, carelessly, for commercial purposes, I think it might be very bad. Q. So it would lose its effectiveness in your opinion if it were shown indiscriminately? A. I don't think it would lose its effectiveness for certain groups of people, but the effect on other groups might outweigh its effectiveness and is not the only device available for prison reform." Dr. Merrifield also agreed that the film could be harmful.

[7] The record indicates that the film, although shown to an audience somewhat more limited than the general motion picture audience, was commercially exploited and appellant earned substantial amounts from its exhibitions in the Bay Area. Applying the criteria recently set forth in Ginzburg v. United States, supra, we are, therefore, further propelled toward the conclusion that it is utterly without redeeming social importance and that it meets all of the requirements set forth in section 311, subdivision (a), of the Penal Code. As Mr. Justice Stewart noted in Jacobellis v. State of Ohio, supra, 378 U.S. at page 197, 84 S.Ct. at page 1683, hard-core pornography is hard to define but he "knew it when I see it." We think we have seen it in "Un Chant d'Amour." It is nothing more than hard-core pornography and should be banned.

The judgment is affirmed.

SHOEMAKER, P. J., and AGEE, J., concur.

Hearing denied; PETERS, TOBRINER, and MOSK, JJ., dissenting.

may take a description of a real event and turn it into a daydream, the vendor of pornography may represent a medical book as full of daydream material, but the material of true pornography is compounded of daydreams themselves, composed without regard for any given reader or looker, to stimulate and titillate. It bears the signature of nonparticipation —of the dreaming adolescent, the frightened, the impotent, the bored and sated, the senile, desperately concentrating on unusualness, on drawing that which is not usually drawn, writing words on a plaster wall, shifting scenes and actors about, to feed an impulse that has no object: no object either because the adolescent is not yet old enough to seek sexual partners, or because the recipient of the pornography has lost the precious power of spontaneous sexual feeling." (Mead, Sex and Censorship in Contemporary Society, New World Writing, Third Mentor Selection 18 (1963) quoted in Lockhart and McClure, The Law of Obscenity and the Constitution, 38 Minnesota Law Review, 295, fn. 182 at pp. 321-322; emphasis supplied.)

9. As the Federal Government has occupied the field of radio and television to the exclusion of the states (Allen B. Dumont Laboratories v. Carroll (3d Cir. 1950) 184 F.2d 153), this testimony is not pertinent except as an indication that the film was suitable only for a limited audience.

SAUL LANDAU, Petitioner,

v

ADDISON FORDING, Chief of Police, Berkeley, California, et al.

388 US 456, 18 L ed 2d 1317, 87 S Ct 2109, reh den 389 US 889, 19 L ed 2d 199, 88 S Ct 16

[No. 1164]

June 12, 1967

On Petition for Writ of Certiorari to the Court of Appeal of California, First Appellate District.

Same case below, 245 Cal App 2d 820, 54 Cal Rptr 177.

Marshall W. Krause for petitioner.

Robert T. Anderson and Robert P. Berkman for respondents.

Per Curiam.

The petition for a writ of certiorari is granted and the judgment of the Court of Appeal of California, First Appellate District, is affirmed.

Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Stewart, and Mr. Justice Fortas would grant the petition and reverse.

WHITEHOUSE TRUCKING, Inc., Appellant,

v

UNITED STATES et al.

388 US 453, 18 L ed 2d 1317, 87 S Ct 2111

[No. 1255]

June 12, 1967

Appeal from the United States District Court for the Northern District of Ohio.

Same case below, 261 F Supp 9.

Robert P. Mone and James M. Burtch for appellant.

Solicitor General Thurgood Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane and Nahum Litt for the United States et al., and James E. Wilson and Edward G. Villalon for Hennis Freight Lines, Inc., et al., appellees.

Per Curiam.

The motions to affirm are granted and the judgment is affirmed.

# Appendix B.

## State Statutory Standards

## Dealing With

## Offenses Against Morality and Decency.

ARRANGED BY STATE AND TOPIC

| OBSCENITY | LEWDNESS | INDECENCY (Indec. Ex. | NUDITY | MORAL NUISANCE | OBSCENE LANGUAGE | ADULTERY | FORNICATION | SODOMY | INCEST | PR |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | ALABAMA | | | | | |
| Title 14 Chapter 64 14-372 et seq.<br><br>Scienter, Presump. 14-374 (5)<br><br>Obscene defined: "...Lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest." 14-374 (3) | 7-1091 | Exposure: 14-326 (1)<br><br>Enticing child for immoral purpose 14-326 (3) | Nude Pictures 14-374 | Equity Action 14-374 (5)<br><br>Obscenity: Injunc. 14-374 (7)<br><br>Nuisance: "lewdness, assignation or prostitution" 7-1091 | Before Women 14-11 | 14-16 | 14-16 | 14-106 | 14-325 et seq. | 14- et 7- |
| | | | | | ALASKA | | | | | |
| Comic Books 11.40.170 | toward children 11.15.134 | Exposure: 11.40.080<br><br>Contrib. to delinq. of child 11.40.130<br>Delinq: "immoral... obscene,... vulgar,... indecent..." 11.40.150<br><br>Indecent comic book 11.40.170 | | | Telephone: 11.45.035 | 11.40.010 et seq. | 11.40.040 | 11.40.120 | 11.40.130 | 11. et 11. |
| Defin: "Sexually indecent...adultery, homosex., sadism, masochism, perversions, lewd, lascivious, suggestive, amorous embraces, scan breasts or genitals exposed" 11.40.170 (4) | | | | | | | | | | |
| | | | | | ARIZONA | | | | | |
| 13-531 et seq.<br><br>Minors 13-536<br><br>Near School 13-601.01<br><br>Obscene defined: "that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest or a shameful or morbid interes nudity, sex or lewdness going substantially beyond customary limits of candor in description or representation of such matters and is without redeeming social importance." 13-531.01 | 13-651 et seq. 13-492 13-991 et seq. | (see obscenity) | Motion picture depicting nudity (minors) 13-536 | Nuisance: "indecent or offensive to senses" 13-601<br><br>Obscenity: Injunction 13-535 | Language 13-377<br><br>Obscene song: 13-378<br><br>Telephone 13-895 | 13-221 et seq.<br><br>Incestuous Adultery 13-471 | Open and notorious 13-222 | 13-651 13-652 | 13-471 25-101 | |
| | | | | | ARKANSAS | | | | | |
| 41-2729 et seq.<br><br>41-2701 et seq.<br><br>Defin: "obscene, vulgar, indecent" 41-2701<br><br>"matter of grave concern to the people" 41-2714<br><br>Scienter presumed 41-2747<br><br>Sale to minors 41-2742<br><br>Obscene defined: "I. the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 41-2701 (2) | (see obscenity) | Exposure: 41-2701<br><br>Indecency: 41-2703<br><br>Refuse children 41-3127 | Nudism: 47-2709 et seq.<br><br>"public exhibition of nudity" 41-2701<br><br>"private parts exposed in presence of others" 41-2709 | Injunc. 41-2721 41-2718<br><br>Action in Chancery Court: 41-2717<br><br>Nuisance, moral comp. 34-101 et seq. | 41-1401 | Divorce grounds 34-1202 | Charge of, is slander 41-2407 | 41-813 41-814 | 41-811 53-103 et seq. | |

| OBSCENITY | LEWDNESS | INDECENCY (Indec. Ex.) | NUDITY | MORAL NUISANCE | OBSCENE LANGUAGE | ADULTERY | FORNICATION | SODOMY | INCEST | PROSTITUTION |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | CALIFORNIA | | | | | |
| Penal Code 311 et seq.<br><br>Local regulation of exposure of genitals, buttocks or breasts (eating places) PC 318.5<br><br>Obscene defined: "when as a whole, the predominate appeal of which to the average person applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." PC 311 (a) | PC 314, 650 1/2<br><br>PC 11225 et seq.<br><br>Registration of offenders PC 290 | Obscene live conduct PC 311.6<br><br>Acts outraging decency PC 650 1/2<br><br>Indecent Exposure PC 314<br><br>Indec. Exhibit., children participating Lab 1308 | Topless waitresses and entertainers Penal Code<br><br>See obscen. defin. PC 311 (a) | Nuisance: "lewdness, assignation or prostitution..." PC 11225<br><br>Nuisance: "indecent or offensive to the senses." CC 3479<br><br>Public nuisance: "indecent" CCP 731 | Vulgar, profane or indecent PC 415<br><br>sung 311.6 | PC 269a 269b | Cohabitation PC 269a 269b | PC 286 288 A | PC 285 | Penal Code 647<br><br>Nuisance PC 11225 |
| | | | | | COLORADO | | | | | |
| 40-9-14 et seq. Mandamus against D.A. 40-9-21<br><br>Obscene defined: "...means...lewd, or indecent, or lascivious...or other representation...of an immoral or indecent nature...pictures of men or women in obscene attitudes or positions...indecent or immoral details of crime, vice, or immorality, to corrupt public morals, or to offend common decency...or to make...immorality and licentiousness attractive..." 40-9-17 | 40-9-15 (see indecency) | Indecent liberties 40-3-32<br><br>Lewd display or notorious act of public indecency 40-9-15 | | Nuisance: "lewdness, assignation, or prostitution" 39-15-2<br><br>Injunction: 40-9-23 40-7-105 | | 40-9-1 et seq. 40-6-501 | 40-9-3 40-9-15 | Loss of civil rights 39-10-18 | 40-9-4 et seq.<br><br>Disqual. for civil rights 39-10-18 | 40-9-15 |
| | | | | | CONNECTICUT | | | | | |
| 53a-193 et seq.<br><br>Minors 53a-196<br><br>Indecent names 53a-197<br><br>Obscene defined: "...(1) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, (2) it goes substantially beyond customary limits of candor in describing or representing such matters, and (3) it is utterly without redeeming social value." 53a-193 | 53-185 et seq. | 53a-82 et seq. | Nudity defined: 53a-193 (2)<br><br>See obscen. defin. 53a-193 | Nuisance: "lewdness, assignation, or prostitution" 19-316<br><br>Obscenity: Injunction 53a-190 53a-200 | (repealed) | 53a-81 | (repealed) | Penal Code 76 et seq. | 53a-191 | Penal Code 83 et seq. |
| | | | | | DELAWARE | | | | | |
| 11-711 et seq.<br><br>Minors 11-410 et seq.<br><br>Obscene defined: "...obscene, lewd, lascivious, filthy, indecent...or instrument of indecent or immoral use or purpose..." 11-711 | Defined 11-731 | | Nudity defined: 11-438a (e) | "social vices" Nuisance: 10-7101 et seq.<br><br>Nuisance: "lewdness, assignation, or prostitution" 10-7107<br><br>Obscenity: Restraining order in Chancery 11-438 e | 11-575 11-591 11-821<br><br>Curtesy of Hus. owned by, 25-744 | 11-591 11-821 822 | | | 11-591 24-1790 | 11-731 et seq.<br><br>15-701 |

| OBSCENITY | LEWDNESS | INDECENCY (Indec. Ex.) | NUDITY | MORAL NUISANCE | OBSCENE LANGUAGE | ADULTERY | FORNICATION | SODOMY | INCEST |
|---|---|---|---|---|---|---|---|---|---|
| | | | | **DISTRICT OF COLUMBIA** | | | | | |
| 22-2001 et seq.<br><br>47-2357<br><br>Obscene defined: | 22-3713<br><br>Lewd, indecent or obscene acts 22-111.3<br><br>Nuisance 22-3713 | 22-1112 | (not researched) | Nuisance "lewdness, assignation or prostitution 22-3713 | | 22-301 | | | 22-1901 |
| | | | | **FLORIDA** | | | | | |
| 847.011 et seq.<br><br>Nuisance: 823.05<br><br>Minors: 847.012<br><br>Scienter Presumption: 847.011 (1) (b) | Defined: 796.07 847.011<br><br>Children and minors 847.012 .013<br><br>License revocation, barbers 476.14 | Exposure: 800.03 .03 | Nudity defined: 847.013 (b) | Obscenity: Injunction: 847.011 (3) (a)<br><br>Nuisance: "luxurious to the morals, prostitution, assignation, lewdness, games of chance..." 823.05<br><br>Obscenity: Injunction: 847.011 (3) (a)<br><br>Pre-emption of legislature 847.013 | 847.05<br><br>Pupil using: 233.25<br><br>Open indecency 847.04 | 798.01 798.04 | 798.03 .04<br><br>Female children and adults 794.05 .08 | 800.01 .02 | 741.32 |
| Obscene defined: "...obscene, lewd, lascivious, filthy, indecent, sadistic, or masochistic..." 847.011 (1) (a) | | | | | | | | | |
| | | | | **GEORGIA** | | | | | |
| 26-2101 et seq.<br><br>Minors 26-9901a<br><br>Pandering as separate test: 26-2101 (c) | 26-2011 | Public indecency 26-2011<br><br>Indec. Ex. children disposed of for 14-9914 ypes<br><br>Disbarment of attorney for 9-501<br><br>Enticing child for indec. purposes 26-2029 | Nudity or sexual conduct, material depicting 26-2102<br><br>See obscen definition 26-2101 (b) | Nuisance: "...tends greatly to corrupt the manners and ... morals of... the people" 72-201<br><br>Crime is indictable as a nuisance 72-9901 | 26-2613<br><br>May justify assault 26-1306 | 26-2009 | 26-2010 | 26-5901 et seq. | 26-2006 |
| Obscene defined: "...if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful interest in nudity, sex or excretion, and utterly without redeeming social value and, in addition, it goes substantially beyond limits of candor in describing or representing such matters." 26-2101 (a) | | | | | | | | | |
| | | | | **HAWAII** | | | | | |
| 727-8 et seq.<br><br>Public shows 145-165<br><br>Obscene literature 727-6<br><br>Obscene defined: | 768-12 727-1 et seq.<br><br>Lascivious conduct 768-51 | (not researched) | | Nuisance: "...obscene, lewd, lascivious, filthy, indecent, or disgusting... ...tends to the corruption of the morals..." 727-8 | 758-1 -4 | 768-11 et seq. | 768-15 et seq. | 768-61 et seq. | 768-41 |
| "...filthy, lewd, lascivious, filthy, indecent, or disgusting, or the chief features of which consist of pictures or descriptions of sexual conduct tends to the corruption of the morals of youth, or of morals generally..." 727-8 | | | | | | | | | |

| OBSCENITY | LEWDNESS | INDECENCY (Indec. Ex.) | NUDITY | MORAL NUISANCE | OBSCENE LANGUAGE | ADULTERY | FORNICATION | SODOMY | INCEST | PROSTITUTION |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | IDAHO | | | | | |
| Minors 18-1514 et seq.<br><br>Rate pornography 18-1515<br><br>Enticement 18-1509<br><br>Each commercial contribution to crime and injury ethical development 18-1514 | Open lewdness 18-3101 | 18-4101<br><br>"Indecent Nuisance" 52-111 | Nudity defined: 18-2105 (2)<br><br>Nudity (minors) 18-2108 (1) (a)<br><br>"Nudity" See obscen. definition 18-2105 (6) | Moral Nuisance "injurious to morals... indecent..." 52-101<br>"injurious to public morals..." 52-103<br><br>Obscenity enjoined 18-1513 et seq.<br><br>Injunction obscenity 18-2111<br><br>Nuisance: "Prostitution, lewdness, assignation or other indecent acts, or house of ill fame" 52-104 | | 18-6601 31-603 52-604 | Lewd cohabitation 18-6604 | 18-6605 6606 | 18-6603 32-205 | 18-2102<br><br>Nuisance 52-104 |

Needed to ensure defined:
" (6) The quality of any material or of any performance or of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it: (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors. (b) The quality of any material or of any description or representation, in whatever form, which , as a whole, has the dominant effect of substantially arousing sexual desires in persons under the age of eighteen (18) years." 18-2105 (6)

| | | | | | ILLINOIS | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| 38-10-30<br><br>Minors 38-11-21 et seq.<br><br>Minors 38-23-1353 et seq.<br><br>Prima facie evid. of intent 38-10-30 (a) | 9-2701 et seq. | Lewd exposure: "Public indecency...includes...(1) sexual intercourse... (2) deviate sexual intercourse... (3) lewd exposure of the body...(4) lewd fondling of the body..." 38-11-9<br><br>Indec. liberties w/child 38-11-4 et seq. | Nudity (minors) 38-11-21 (b) (1) "Nudity" See obscen. defin. 38-11-20 (b) | Nuisance: "Lewdness, assignation, or prostitution" 100 1/2-1 | telephone 134-15.4 15.5<br><br>Passengers 114-87.49 | 38-11-7 | 38-11-8 | 38-11-2 | 38-11-11 38-11-10 | 38-11-14 et seq.<br><br>Nuisance 38-37-1 100 1/2-1 |

Obscene defined:
"...considered as a whole, its predominate appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters..." 38-11-20 (b)

| | | | | | INDIANA | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| 9-1201 et seq.<br><br>Minors 10-917 et seq.<br><br>Teaching in high schools 10-4210<br><br>Yellow back novels 10-1401 | Lewd matter 10-2803<br><br>Nuisance: 9-2701<br><br>Immoral places 10-4210 | Exposure: 10-2801<br><br>Letting stallions in public 10-2803 | Nudity defined: 10-917 (b)<br><br>Nudity (minors) 10-919 | Nuisance: "lewdness, assignation or prostitution" 9-2701 et seq. | In presence of female: 10-2801<br><br>telephone 10-4944 | 10-4207 | 10-4207 4208 | 10-4231 | 10-4206 | 10-4230 et seq.<br><br>Nuisance 9-2701 |

Obscene defined:
"...obscene, lewd, indecent, or lascivious..., instrument or article of indecent or immoral use,..." 10-2803

| OBSCENITY | LEWDNESS | INDECENCY (Indec. Ex.) | NUDITY | MORAL NUISANCE | OBSCENE LANGUAGE | ADULTERY | FORNICATION | SODOMY | INCEST | PROSTITUTION |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | **IOWA** | | | | | |
| 725.3 et seq.<br><br>Minors 725.8 | 725.1 et seq.<br><br>Lewd act in presence of child; corrupting morals of children: 725.2, .3 | Exposure 725.1 | | Nuisance: "...indecent..." 657.1 | Profane and indecent 728.1 | 702.1 | vicious... cohabitation 725.1 | 705.1, .2 | 704.1 | 724.1 et seq. |
| Obscene defined: "...obscene, indecent, immoral, or impure...which would tend to the corruption of the morals of youth or others..." 725.3 (dram. play, exhibition, show or entertainment) . "...obscene, lewd, indecent, lascivious, or filthy...or article of indecent or immoral use..." 725.5 (book, pamphlet, picture, writing or instrument). | | | | | | | | | | |
| | | | | | **KANSAS** | | | | | |
| 21-4301<br><br>Minors 21-4301 a | Lewd and lascivious behavior: "sexual intercourse...being viewed ...or the exposure of a sex organ..." 21-3508 | Exposure: 21-3508 | See obscen. definition 21-4301 (2) (a) | "Endangers ...public health" 21-4113 | In films 51-112 (researched 1970)<br>telephone 21-4113 | 21-3507 | 21-909 23-110 (repealed) | 21-3505 aggravated sodomy 21-3506 | 21- 3602 | 21-3512 et seq. |
| Obscene defined: "...considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and the material is patently offensive and utterly without redeeming social value..." 21-4301 (2) (a) | | | | | | | | | | |
| | | | | | **KENTUCKY** | | | | | |
| 436.090 et seq.<br><br>Minors 436.101 (3) et seq. and 436.540 et seq. Publics. featuring crime 436.110<br><br>See offenses against morality"<br><br>Illicit sex in comic books 436.540 et seq. | 436.075<br><br>Exhibiting studhorse, jack or bull 436.170 | Exposure bathing garb 436.140<br><br>Indecent practices 435.105 (researched 1970) | "Nudity" See obscenity definition 436.101 (c) | Injunction, obscene matter 436.570 | 06.170<br><br>telephone 436.107<br><br>swearing profane cursing 431.090 436.150<br><br>train 277.260 437.090 | 436.070 | 436.070 | Sodomy buggery 436.050 | 436.080 | 436.075 Nuisance 233.080 |
| Obscene defined: "...to the average person, applying contemporary standards, the predominant appeal of the matter taken as a whole, is to prurient interest, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters." 436.101 (c) | | | | | | | | | | |
| | | | | | **LOUISIANA**<br>Civil (Roman) law State | | | | | |
| 14.106<br><br>Minors 14:91.11 14:92.2<br><br>Pre-emption of regulation 14:92.2 | Disorderly conduct 14:103<br><br>Exhib. of minors 23:251 | Contrib. to delinquency: "place where sexually indecent and obscene material...is offered...or exhibited" 14:92<br><br>Indecent behavior 14:81<br><br>Public morals 14:281 et seq. | Nudity defined: 14:92.2 A (2) | Obscenity, Nuisance "assignation, prostitution or obscenity" 13:4711 | 14:92<br><br>telephone 14:285 45:1166<br><br>Language or gestures 14:103 | | (indexed under other topics) | 14:89 | 14:78 | 14:82 et seq. |
| Obscene defined: "(1) Exposure of one's person in a public place...that sex organ may be seen...by another.... with the intent of arousing sexual desire. (2) Production (of matter)...with the intent to primarily appeal to the prurient interest...of any lewd, lascivious, filthy or sexually indecent (matter)...(4)...any lewd, lascivious, sexually indecent dancing, lewd, lascivious or sexually indecent posing, lewd, lascivious or unusually indecent body movement..." 14:106 A | | | | | | | | | | |

| OBSCENITY | LEWDNESS | INDECENCY (Indec. Ex.) | NUDITY | MORAL NUISANCE | OBSCENE LANGUAGE | ADULTERY | FORNICATION | SODOMY | INCEST | PROSTITUTION |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | **MAINE** | | | | | |
| 17-2901 et seq.<br>17-2911<br>Minors 17-2903<br>Obscenity 17-2903 | 17-2031 | 17-901 | Nudity defined: 9-960 | Nuisance: "Places resorted to for lewdness" 17-2761 | Indecent language profanity and offensive language 17-452 | 17-101 | 17-1551 | 17-1001 | 17-1101 | 17-3051 |
| Obscene defined: "...illustrations of ...sadism, masochism, sexual perversion, bestiality or lust, or obscenity, indecency or immorality..." 17-2901 | | | | | | | | | | |
| | | | | | **MARYLAND** | | | | | |
| 27-407 et seq.<br>Minors 27-419 et seq.<br>Obscene movies 466-65<br>Obscene defined: | Defined 27-15 | Indecent exposure 27-122 | Nudity proscribed and defined 27-416 A-G<br>Nudity and sexual displays 27-436A | Injunction obscenity; circuit cts. and equity cts. 27-416 A | Profanely cursing in streets 27-121<br>Blasphemy 57-13<br>telephone 27-555A | for divorce 16-24 | Abduction for fornica. 27-1 | 27-553 554 | 27-335 390 391 | 27-1 et seq.<br>27-125 420 429 431 575 |
| "...obscene..." 27-416 (held to give adequate warning of the conduct proscribed and to mark boundaries sufficiently distinct for judges and juries fairly to administer the law. Levin v. State, 1 Md. App. 139, 228 A. 2d 487 (1967).) | | | | | | | | | | |
| | | | | | **MASSACHUSETTS** | | | | | |
| Incest 272-18b et seq. wholesale 270-28b<br>Minors 272-18<br>Scienter presumption 270-34A<br>Obscene notice 272-30<br>Obscene literature Council Commission 6-8B<br>Obscene defined: | Immoral Entertainments "lewd, obscene, indecent, immoral or impure show ...or tending to corrupt morals of youth..." 272-32 33<br>Unnatural and lascivious act 272-35<br>Lewd and lascivious persons 272-53 | Indecent Exposure 272-53<br>Devices for indecent purposes 272-21 | Nudity: See obscenity definition 272-28 (par. 2) | Obscenity, petition in equity 272-28C<br>Nuisance "prostitution, assignation or lewdness" 139-4 | Profane obscene impure language 272-31<br>Blasphemy 272-36<br>Obscene language at sporting event 272-36A<br>Arrest for using 272-59<br>telephone 269-14A | 272-14 et seq. | 272-18 et seq. | 272-34<br>Unnatural and lascivious acts 272-35 35A 277-45 | 272-17 | 272-53 et seq.<br>Nuisance 139-4 |
| "...obscene, indecent or impure..." 272-28A | | | | | | | | | | |
| Obscene to minors defined: "...obscene, indecent or impure, harmful to minors, or manifestly tends to corrupt the morals of youth..." "...harmful to minors" (means) ...representation of nudity, sexual conduct or sexual excitement which appeals predominately to the prurient, shameful or morbid interest of minors under eighteen years of age, is patently contrary to prevailing standards of adults in the community as to suitable material for such minors, and is utterly without redeeming social importance for such minors." 272-28 | | | | | | | | | | |
| | | | | | **MICHIGAN** | | | | | |
| Penal Code 28.575 et seq.<br>27A.2930 et seq.<br>Minors 28.575 (5)<br>Obscenity explained 27A.2930<br>Scienter presumption 28.575 (1) | Gross lewdness and lascivious behavior 28.567<br>Homosexuality 28.570 | Exposure 28.567 (1)<br>City power 5.1740<br>Gross indecency 28.570 (1)<br>Exhibition of children 28.335 | Nudist camps, taxation 7.555 (3a) | Village powers 5.1285 5.1332<br>Nuisances: 28.569 | Indecent language in presence of women and children | 28.210 219 | Lewd and lascivious cohabitation 28.567 | 28.355 356 | 28.565 | 28.131 .345 (3) .409 .703 .717 .1285 .1065<br>Nuisance 27A.3801 |
| "Lewdness, assignation, prostitution, gambling, prostitutes, disorderly persons, (illegal) narcotic drugs, (illegal) liquors..." 27A.3801<br>Obscenity Injunction: "...obscene, lewd, lascivious, filthy, indecent, or disgusting, or...instrument of indecent or unmoral use..." 27A.2930 | | | | | | | | | | |
| Obscene defined: 1. "...obscene, lewd, lascivious, filthy or indecent, sadistic or masochistic..."; 2. Test to be applied: "...the effect of the [material]...considered as a whole...upon the average person in the community....judged...by the standards of common conscience of the community of the contemporary period of the violation charged:" 3. "...portrayal...of illicit sex, or sexual relations, of perversion, lust or sexual passion..." 1. 28.575 (1); 2. 28.575 (2); 3. 28.575 (3) | | | | | | | | | | |

| OBSCENITY | LEWDNESS | INDECENCY (Indec. Ex.) | NUDITY | MORAL NUISANCE | OBSCENE LANGUAGE | ADULTERY | FORNICATION | SODOMY | INCEST | PROSTITUTION |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | **MINNESOTA** | | | | | |
| 617.241 et seq.<br><br>Minors 617.293<br><br>Village power to restrain 412.221 | gross lewdness and lascivious behavior 617.23 | Lewd exposure 617.23<br><br>Indecent articles 617.23 .251 | Nudity defined 617.292 (3)<br><br>Nudity (minors) 617.293 (a) | Obscenity: Village power to restrain and punish 412.221<br><br>Obscenity Public Nuisance 609.74 | Language provocative of assault 615.15<br><br>telephone 634.75 | 617.15 (repealed) | 617.16 (repealed) | 609.293<br><br>Bestiality 609.294 | 617.13 | 617.3 et seq. (repe |
| Obscenity is harmful to minors; urgent need to prevent commercial exposure. 617.291 (Subdiv.1)<br><br>Motion pictures rating system, evid. 617.297 | | | | | | | | | | |
| Obscene defined: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a wh appeals to prurient interests." 617.241 | | | | | | | | | | |
| | | | | | **MISSISSIPPI** | | | | | |
| 11-2674-01 et seq.<br><br>Maximum promptness and dispatch 11-2674-08<br><br>Enjoined 11-2674-10<br><br>equity rules in procedure 11-2674-08<br><br>Scienter presumption 2674-15 | Bastillon or jack in public view 11-2232 | "private parts" exposure 11-2290<br><br>Obscene indecent immoral exhibitions 11-2286 | | Nuisance "lewdness, assignation or prostitution" 11-1060<br><br>Obscenity enjoined 11-2674-10<br><br>Obscenity action in Chancery ct. 11-2674-04<br><br>rules of civil procedure pertaining to equity cases are applicable 11-2674-08 | "Profanely swear or curse...use vulgar and indecent language..." 11-2291<br><br>telephone 11-2231.5 | 11-1998 et seq. | 11-1998 et seq. | (not researched) | 11-457 458 | 11-3 et se<br><br>Nuis 11-1 |
| Obscene defined: "...to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole a to prurient interest." 2674-02 | | | | | | | | | | |
| | | | | | **MISSOURI** | | | | | |
| 563.270 et seq.<br><br>Search and seizure 542.300 et seq. 563.286<br><br>Minors 563.310<br><br>Enjoined 563.295 | 542.430<br><br>563.150 | Exposure to minors 563.160<br><br>Exposure 563.150 | | Obscenity enjoined 563.285 | Vulgar obscene or indecent pleadings in newspaper 563.280 | 563.150 | | 563.230 | felony 563.230 | 563. et se<br><br>Nuis "inv hous 563. |
| Obscene defined: 1. "...devoted mainly to...scandals, whorings, lechery, assignations, intrigues between men and woman and immoral conduct persons..." 563.270; 2. "...obscene, lewd, licentious, indecent or lascivious...or other publication of indecent, immoral or scand character...or publish in any newspaper any vulgar, scandalous, obscene or immoral pleadings or evidence..." 563.280 | | | | | | | | | | |
| | | | | | **MONTANA** | | | | | |
| 94-3601 et seq.<br><br>seizure authorized 94-3604 94-3618 | lewdness 94-1002 | Indecent exposure: 94-3603 "private parts" | | Nuisance: "indecent or offensive to senses" 57-101 93-6101 94-1001 et seq. 57-110 57-103 Nuisances: "lewdness, assignation, prostitution, gambling, (illegal) wine rooms, (illegal narcotics), or other illegal acts prohibited by title 94 chapters 24 and 30." | sing lewd or obscene song or words 94-3603 (5) | 94-4107 | 94-4107 | 94-419 94-4118 | 48-105 94-705 | 94-3 et se<br><br>Nuis 94-1 |
| Obscene defined: "...to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters." 94-3601 | | | | | | | | | | |

| OBSCENITY | LEWDNESS | INDECENCY (Indec. Ex.) | NUDITY | MORAL NUISANCE | OBSCENE LANGUAGE | ADULTERY | FORNICATION | SODOMY | INCEST | PROSTITUTION |
|---|---|---|---|---|---|---|---|---|---|---|
| **NEBRASKA** | | | | | | | | | | |
| 28-931 et seq.<br><br>chargeable with knowledge after service 28-921.01<br><br>search and seizure 28-921.01<br><br>Declara. judgment 28-926.01 926.03 | 28-290 | Indecent exposure 28-290 | | Obscenity injunction 28-928.01 28-926.02<br>\|<br>Nuisance defined 28-1016<br>\|<br>Offensive matter nuisance 28-1014<br>\|<br>Nuisances "Lewdness, assignation, or prostitution" 28-910 | In presence of female 28-929<br><br>defined 28-936<br><br>child use 43-504 | 28-902 | Seduction and fornication 28-927 928 | 28-919 | 28-904 et seq. | 28-931 et seq. Injunction 28-931 |
| Obscene defined: "...obscene, lewd, indecent, or lascivious..." 28-921 | | | | | | | | | | |
| **NEVADA** | | | | | | | | | | |
| 201.250 et seq.<br><br>chargable w/knowledge after summons 201.250 (4) (a)<br><br>Minors 201.265 | Open and gross lewdness 201.210<br><br>Registration of sex offenders 207.151 et seq. | Indecent exposure 201.220<br><br>Exhibition of "obscene indecent or immoral" show 201.253 Employment for indecent exhib. 609.210 | Nudist colonies 444.070<br><br>Nudity defined 201.261<br><br>Nudity (minors) 201.265 (1)<br><br>Nudity: see obscenity definition 201.250 (1) (b) | Public nuisance 202.450 .460<br><br>City power 266.350<br><br>Obscenity injunction 201.250 (4) (b) | Obscene calls, telephone 201.255 | Grounds for divorce 125.010 | (see sexual intercourse) | 201.190 | 201.180 | Advertising prostitution forbidden 201.430 et seq.<br><br>Pandering 201.300 |
| Obscene defined: "...that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest or a shameful or morbid interest in nudity, sex or lewdness going substantially beyond customary limits of candor in description or representation of such matters." 201.250 (1) (b) | | | | | | | | | | |
| **NEW HAMPSHIRE** | | | | | | | | | | |
| 571:1 et seq.<br><br>City's power to restrain 47:17 | 570:3 et seq.<br><br>579:15 | Indecent exposure 570:6<br><br>Indecent conduct 570:22 et seq. | | Nuisances: "lewdness, assignation or prostitution" 544:1<br><br>Immoral purposes chap. 544<br><br>Offensive businesses 147:15 | Lascivious speech 570:25<br><br>570:2 :3<br><br>offense against morality 570:2<br><br>telephone 572:38-b 571:14 | 579:1 :2 | 579:4 | 579:3 | 579:7<br><br>457:1 et seq. | 579:14 et seq.<br><br>Nuisance 544:1<br><br>570:19 |
| Obscene defined: "...obscene or lewd or lascivious..." 571:14 | | | | | | | | | | |

## NEW JERSEY

| OBSCENITY | LEWDNESS | INDECENCY (Indec. Ex.) | NUDITY | MORAL NUISANCE | OBSCENE LANGUAGE | ADULTERY | FORNICATION | SODOMY | INCEST | PROSTITUTION |
|---|---|---|---|---|---|---|---|---|---|---|
| 2A:115-1 et seq.<br><br>Pandering 2A:115-1.2<br><br>To minors 2A:115-1.3 115-3.2 | Open lewdness or notorious act.. tending to debauch morals<br><br>2A:115-1 | Exposure: 2A:115-1<br><br>Indecencies in publication 2A:115-3 | | Nuisance: "gather...for purposes of gratifying themselves" 2A:130-2 120 N.J.L. 381<br><br>Municipal power 40:72-3<br><br>Obscenity injunction 2A:115-3.5<br><br>Nuisances: "prostitution, lewdness, or assignation" misdemeanors 2A:133-2 | 2A:140-2<br><br>Indecent communications to female 2A:135-4 | 2A:34-7<br><br>2A:88-1 | 2A:110-1 | 2A:143-1 -2 | 2A:114-1 et seq. | 2A:1 et s |

Obscene comic books "...basic factor in impairing the ethical and moral development of our youth and constitute a clear and present danger to the people of the State." 2A:115-3.3

Prompt judgment 2A:115-3.6

Obscenity:

1. Legislative findings: "The Legislature finds that the standards of obscenity now enunciated in chapter 115 of Title 2A of the New Jer Statutes as amended and supplemented in recent years is unnecessarily permissive and a hindrance to effective legal action against ob matter. The Legislature further finds that such unnecessary permissiveness has resulted from the incorporation into New Jersey Statut language from influential opinions authored by certain United States Supreme Court justices; which language, however, does not repre binding majority decisions of the Supreme Court and, accordingly, need not bind the Legislature or the judiciary of this State." 2A:115-

2. Obscene defined: "...that which to the average person, applying contemporary community standards, when considered as a whole, its dominant theme or purpose an appeal to prurient interest." 2A:115-1.1

## NEW MEXICO

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| Power of municipalities to suppress 14-21-12 14-17-14 | | Exposure 40A-9-9 | | Nuisance: "injurious to public...morals..." 40A-9-1 | | 40A-10-2 | | 40A-9-8 | 40A-10-3 | 40A-10-3 |

## NEW YORK

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| Penal Code 235.00 et seq.<br><br>Scienter presumptions PC 235.10 PC 235.23<br><br>to minors PC 235.20 PC 235. 21<br><br>Motion Picture Films Educ. 122-a<br><br>Seizure and forfeiture Penal 410.00 | | Indecent exhibitions Educ 3216-c<br><br>At fairs or expositions Agric. and M 288<br><br>revocation of license for, vehicle and T 394<br><br>Indecency injunction Crim 22-a | Nudity defined PC 235.20 (2) | Obscenity injunction CPLR 6330<br><br>Obscenity town's power to prohibit Town 130 (11)<br><br>Nuisance: "lewdness, assignation, or prostitution" Pub H 2320 | Obscene gestures or lang. Penal Code 240.20<br><br>Abusive or obscene language in public Penal 240.25 | Penal Code 255.17 | | Penal Code 130.00 | Penal Code 255.25 | P 2 e<br>e<br>a<br>P<br>a<br>h<br>l<br>( |

Obscenity

1. Constitution. (liberty of conscience not to excuse acts of licentiousness.) Const art 1, Sec.3

2. Obscene defined: "...(a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, cretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such mat and (c) it is utterly without redeeming social value." Penal Code 235.00

## NORTH CAROLINA

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 14-190.1 et seq.<br><br>to minors 14-190.7 190.8<br>Adversary proceedings 14-190.2 & injunction | Lewd women within three miles of colleges 14-193 | Indecent exposure 14-190.9<br><br>Indecent exposure, immoral shows 14-190 | (see Infants) | Nuisances: "lewdness, assignation prostitution, gambling, or illegal sale of whiskey or narcotic drugs" 19-1 et seq. Obscenity injunction 14-190.2 | Profane or indecent language 14 -195<br><br>telephone 14-196<br>profane or obscene language on highways 14-197 | 14-184 | 14-177 | 14-178 179 | |

Obscene defined: "..(1) The dominant theme of the material taken as a whole appeals to the prurient interest in sex; and, (2) the mat patently offensive because it affronts contemporary national community standards relating to the description or representation of sexu matters; and, (3) the material is utterly without redeeming social value; and, (4) the material as used is not protected or privileged u the Constitution of the United States or the Constitution of North Carolina." 14-190.1 (b)

| OBSCENITY | LEWDNESS | INDECENCY (Indec. Ex.) | NUDITY | MORAL NUISANCE | OBSCENE LANGUAGE | ADULTERY | FORNICATION | SODOMY | INCEST | PROSTITUTION |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | NORTH DAKOTA | | | | | |
| 12-21-07 et seq.<br><br>Municipal power to prohibit 40-05-01 | Lewdness unlawful 12-22-14(7)<br><br>"Lewdness shall include any indecent or obscene act" 12-22-15 (3)<br><br>Lewdness nuisance 12-23-14 | Indecent exposure 12-21-10<br><br>Carnivals, indecent shows 53-03-03<br><br>Producing indecent material 12-21-10<br><br>House for indecent purposes 12-22-28<br><br>"Act which openly outrages public decency and is injurious to public morals" misdemeanor 12-22-01 | | Nuisances: "...offends decency..." 42-01-01 et seq.<br><br>common nuisance: "for any other lewd, obscene, or indecent purposes..." 12-23-28,29<br><br>nuisances: "Prostitution lewdness, or assignation" 12-23-14 | Obscene language 12-21-03 et seq.<br><br>Blasphemy 12-21-01 | 12-22-09 et seq. | 12-22-08<br><br>Unlawful cohabitation 12-22-12 | 12-22-07 | 12-22-06 | 12-22-14 et seq.<br><br>Nuisance: disorderly house 23-22-27 |
| Obscene defined: "...obscene, lewd, salacious, or lascivious...or other matter of indecent character..." 12-21-07 | | | | | | | | | | |
| | | | | | OHIO | | | | | |
| 2905.34 et seq.<br><br>Search warrants 2933.53<br><br>Criminal presumption 2905.38<br><br>Minors 2905.35 et seq. | Exhibiting lewd pictures in saloon 2905.41 | Indecent exposure 2905.30<br><br>Giving immoral exhibition 2905.40 | Nudity defined 2906.34<br><br>Nudism prohibited 2905.31 | Nuisances: "lewdness, assignation, or prostitution...lewd, indecent, lascivious or obscene films..." 3767.01 et seq.<br><br>Obscenity enjoined 2905.37 | 715.55<br><br>2923.38<br><br>Munic. pur. to forbid 715.55 profane, immoral, or indecent language 2905.40<br><br>obscene or licentious language before female or child 2905.30.1<br><br>Telephone 4931.31 | 2905.08<br><br>Dower barred for, 2103.05 | 2905.08<br><br>Indictment RC 2941.07 | 2905.44<br><br>2951.04<br><br>Giving immoral exhibitions ref. 2905.40 | 2905.07 | 2905.32 et seq. |

Obscene defined: 1. "...obscene, lewd, or lascivious...(material)..or article of an indecent or immoral nature../..or show to a minor...stories of sexual deeds, lust, or crime..." 2905.34

1. "...considered as a whole and judged with reference to ordinary adults, any of the following apply: (1) Its dominant appeal is to prurient interest; (2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite; (3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality; (4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose." 2905.34 A

| OBSCENITY | LEWDNESS | INDECENCY (Indec. Ex.) | NUDITY | MORAL NUISANCE | OBSCENE LANGUAGE | ADULTERY | FORNICATION | SODOMY | INCEST | PROSTITUTION |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | OKLAHOMA | | | | | |
| 21-1021 et seq.<br><br>21-1040.8 et seq.<br><br>seizure 21-1022<br><br>swift trial wi-1034<br><br>Oklahoma literature commission 21-1040.3<br><br>display of sexual intercourse on outdoor screen prohibited 21-1040.52 | Lewd defined: "licentious, lecherous, dissolute, debauched, impure, salacious or pornographic" 21-1040.12 | Indecent exhibition or exposure "private parts" "such as is offensive to decency... or to excite ...lewd thoughts." 21-1021 (second) | | Nuisance: "...offends decency..." 10-1<br><br>injunction 12-1397<br><br>Obscenity injunction 21-1022 | 21-901 et seq.<br><br>Recording obscene or indecent language, songs, etc. 21-1021 (4)<br><br>telephone 21-1172 | 21-871 et seq.<br><br>Depiction of adultery forbidden 21-1040.51<br><br>Incestuous adultery 21-885 | Showing sexual intercourse on outdoor screen (misdem.) 21-1040.52 | 21-886 -887<br><br>Showing unnatural copulation on outdoor screen 21-1040.52 | 21-885<br><br>43-3<br><br>21-157 | 21-1021 et seq. |
| Obscene defined: 12. ..obscene filthy, indecent, lascivious, lewd or unfit..." 21-1040.8; 2. "...to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 21-1040.12 (other words defined: filthy, indecent, lascivious, and lewd 21-1040.12): 3. "(b) 'obscene literature'...any literature offensive to the chastity or modesty, expressing or presenting to the mind or view something that purity and decency forbids to be exposed, or...comic books which... are not uplifting and beneficial to the education, welfare, and character building of the children of Oklahoma." 21-1040.1 (b) | | | | | | | | | | |
| | | | | | OREGON | | | | | |
| Obscene matter crime 167.151 | Lewdness nuisance 465.110 | Indecent exposure 167.145 | | Nuisances: "lewdness, assignation, or prostitution, or any other immoral act..." 465.110 | 166.060<br><br>school pupils 339.250 | 167.005 .050 | 167.030 .035 .060 | 167.040 | 167.035 .050 | 167.110 .120 .140 .150 .225 et seq.<br><br>Nuisance 465.130 |
| Obscene defined: "...if, considered as a whole, its predominant theme appeals to prurient interest, and if it is patently offensive and goes substantially beyond the customary limits of candor in describing or representing such matter with reference to ordinary persons." 167.151 (2) | | | | | | | | | | |
| | | | | | PENNSYLVANIA | | | | | |
| 18-4524<br><br>Complaint 18-783<br><br>Obscene comic books 18-3831<br><br>injunction 18-3832.1<br><br>Censorship films 4-43 | Nuisance 18-467 et seq. | Public indecency act 18-4519 | Nudity defined 18-4524 | Nuisances: "fornication, lewdness, and/or prostitution..." 18-467<br><br>Public Nuis. "detriments) to public health." 53-37320<br><br>Obscenity injunction 18-3832.1 | 18-632 | 18-4505 | 18-4506<br><br>Bldgs. used for, nuisance 18-467 et seq. | 18-4501 | 18-4507<br><br>minor 18-5110 | 18-4508 et seq.<br><br>18-80<br><br>Nuisance 18-467<br><br>53-37320 (24) |
| Obscene defined: "...that which, to the average person applying contemporary community standards, has as its dominant theme, taken as a whole, an appeal to prurient interest." 18-4524 | | | | | | | | | | |

| OBSCENITY | LEWDNESS | INDECENCY (Indec. Ex.) | NUDITY | MORAL NUISANCE | OBSCENE LANGUAGE | ADULTERY | FORNICATION | SODOMY | INCEST | PROSTITUTION |
|---|---|---|---|---|---|---|---|---|---|---|
| **RHODE ISLAND** | | | | | | | | | | |
| 11-31-1 et seq.<br><br>11-31-1.1 et seq.<br><br>as minors 11-31-10<br>11-31-14<br><br>Injunction 9-31-13<br><br>In rem proceeding 9-31.1-1 | Lewdness nuisance 20-1-1<br>11-30-1<br><br>"lewd" see obscenity definition 11-31-10 | Promotion of obscene shows 11-31-14<br><br>"indecent" see obscenity definition 11-31-10 | Nude figures (minors) 11-31-14<br>11-31-10 | Nuisances: "lewdness, assignation, or prostitution" 11-30-1<br>10-1-1 et seq.<br><br>Advertising along highway 24-10-12<br><br>Obscenity injunction 11-31-13 | 32-2-12<br>13<br><br>11-11-5 | 11-6-2 | 11-34-5<br><br>Incestuous fornication 11-6-4 | 11-10-1 | 11-6-4<br><br>15-1-1 et seq. | 11-45-1<br><br>11-34-1 et seq.<br><br>Pandering 11-34-5<br><br>Nuisance 11-30-1 |
| Obscene defined: 1. "...obscene..." 11-31-1; 2. to minors: "...devoted to, or is principally made up of descriptions of illicit sex or sexual immorality or which is obscene, lewd, lascivious, or indecent, or which consists of pictures of nude or partially denuded figures posed or presented in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion...or instrument of indecent or immoral use..." 11-31-10 | | | | | | | | | | |
| **SOUTH CAROLINA** | | | | | | | | | | |
| 16-414 et seq.<br><br>Pictures 16-415<br><br>Injunction 16-415<br><br>Prompt trial 16-418<br><br>Cumulative regulations 16-421<br><br>Minors 16-414.2 et seq. | Nuisance 10-1001 et seq.<br><br>Receive for purpose of lewdness 16-409 (7) | Indecent exposure 16-413<br><br>Exhibiting indecent pictures 16-415 | | Nuisances: "lewdness, assignation, or prostitution" 10-1001<br><br>Nuisance "dangerous to human health" Vol. 17 ,p226<br><br>Obscenity injunction 16-416 | Obscene message to women 16-552<br><br>telephone 16-552.1 | 16-406 et seq.<br><br>grounds for divorce 20-101 | 16-406<br>16-408<br><br>Disqualifies voter 23-62<br>92 | 16-412 | 16-402 | 16-409 et seq.<br><br>Nuisance 10-1001 |
| Obscene defined: "...obscene, indecent or improper print (etc.)...manifestly tending to the corruption of the morals of youth..." 16-414 | | | | | | | | | | |
| **SOUTH DAKOTA** | | | | | | | | | | |
| 22-24-1 et seq.<br><br>as minors 22-24-13 et seq.<br><br>seizure 22-24-21<br><br>Municipal power to regulate not limited 9-24-15 | | Indecent exposure felony 22-24-1 et seq. 22-24-2.1<br><br>Outraging public decency and "injurious to public morals": 22-24-6<br><br>Procuring indecent exposure 22-24-2 | | Municipal power to remove 9-29-13<br><br>Zoning 11-4-7 | Obscene language 22-13-7<br><br>Obscene or lascivious language in presence of women or children (also telephone) 22-24-5<br><br>Singing, speaking obscene song, word, etc. 22-24-16 | 22-22-17<br>18<br><br>Grounds for divorce 25-4-2 | | 13-1716 | 23-23-19<br>22-22-20<br><br>25-1-6<br><br>13-1715 | 13-1717 et seq.<br><br>Nuisance 21-15-10 |
| Obscene defined: "(1)...that which, by contemporary standards as hereinafter set forth, considered as a whole, has as its dominant theme or purpose an appeal to prurient interest. (2) Prurient interest is defined as a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and which as a matter of state public policy is utterly without redeeming social importance." 22-24-11 | | | | | | | | | | |

| OBSCENITY | LEWDNESS | INDECENCY (Indec. Ex.) | NUDITY | MORAL NUISANCE | OBSCENE LANGUAGE | ADULTERY | FORNICATION | SODOMY | INCEST | PROSTITUTION |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | **TENNESSEE** | | | | | |
| 39-3001 et seq.<br><br>to minors 39-1012 et seq.<br><br>Injunction 39-3005 | | Municipal power to prohibit indecent exhibitions 6-202 | Nudist colony forbidden 39-3009<br><br>Nudity defined 39-1012 | Nuisance: "violates the laws of decency" 39-2901 2902 26 Tenn. App. 454)<br><br>Obscenity injunction 39-3006 | 23-907<br><br>Obscene language 39-3001<br><br>telephone 39-3002 | 23-3601 | 23-3601 | 39-707 | 39-705 706 | 39-3101 et seq. |
| Obscene defined: "...obscene language or obscene prints... manifestly tending to corrupt the morals..." 39-3001 | | | | | | | | | | |
| | | | | | **TEXAS** | | | | | |
| Title 10 Penal Code PC 527 et seq.<br><br>Adversary Hearing PC 527 (8)(c)<br><br>Municipal regulation allowed PC 527 (12)<br><br>Obscenity injunction PC 527 (13)<br><br>Comic books PC 528 | Lewd women in theater PC 516<br><br>Lewdness defined PC 497 | Indecent exhibition PC 526<br><br>Indecent exposure: PC 526 G<br><br>Exposure to infant PC 474 535c<br><br>Indecent exhibitions, films PC 612<br><br>Exposure public grounds PC 862 | Nudity: see definition of "prurient interest" PC 527 (1)(B) | Common nuisances "drinking, gambling, prostitution" 4664<br><br>Obscenity injunction PC 527 (13) | Obscene language PC 474 5154 d-2<br><br>telephone PC 476 | PC 499 500 501 | PC 503 504 | PC 524 | PC 495 et seq. | Penal Code 510 et seq. 607 609 667 1179 et seq. 5221 a<br><br>Nuisance 4664 |
| Obscene defined: "(A)...material (a) the dominant theme of which, taken as a whole, appeals to a prurient interest; (b) which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters and (c) which is utterly without redeeming social val ue." "(B) 'Prurient interest' means a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters." title 10, Penal Code, S.B. 527 (1) (A)and (B) | | | | | | | | | | |
| | | | | | **UTAH** | | | | | |
| 76-39-5 et seq.<br><br>seizure 76-39-7<br><br>Injunction 76-39-10<br><br>Obscenity to minors 76-39-5 (A)<br><br>Hard-core pornography to minors 76-39-5 (B)<br><br>Constructive knowledge 76-39-6<br><br>Local regulation authorized 76-39-16 | Open and gross lewdness: associating in lewd or lascivious or obscene manner 76-39-5(1) | Indecent exposure (misdem.) 76-39-5 76-39-12 | Nudity: see definition of obscenity: 76-39-11 | Nuisance: "...indecent or offensive to senses..." 78-38-1<br><br>Public nuisance: "...(2) offends public decency..." 76-43-1<br><br>City power to declare and abate nuisance 10-8-60<br><br>Obscenity injunction 76-39-10<br><br>Nuisance: "lewdness, assignation, or prostitution" 47-1-1 | Songs, ballads, or other lewd or obscene words in public place 76-39-5(5) 76-39-13 | 76-53-3 | 76-53-5 (misdem.) | 76-53-22 | 76-53-4 | 76-53-12 et seq.<br><br>76-53-13<br>76-53-9<br><br>77-31-14<br><br>78-81-1<br><br>City pow to suppr 10-8-41<br><br>Nuisance 47-1-1 |
| Obscene defined: "...whether to the average person, applying contemporary community standards, the dominant theme of the material or the conduct taken as a whole appeals to the prurient interest...Prurient interest shall mean a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance." 76-39-11 | | | | | | | | | | |

| OBSCENITY | LEWDNESS | INDECENCY (Indec. Ex.) | NUDITY | MORAL NUISANCE | OBSCENE LANGUAGE | ADULTERY | FORNICATION | SODOMY | INCEST | PROSTITUTION |
|---|---|---|---|---|---|---|---|---|---|---|
| **VERMONT** | | | | | | | | | | |
| 13-2801 et seq.<br><br>to mirror 13-2804 et seq.<br><br>Obscene motion pictures 13-2803 | open and gross lewdness 13-2601 | Exhibiting obscene, lewd or indecent picture...or presents indecent or immoral show 13-2802 | | Power of Municipalities 24-2131 | | 13-201<br>202<br>203 | | Fellation 13-2603<br>2601 | | 13-2631<br>13-2632<br><br>house of ill fame 13-2604 |
| Obscene defined: "...lewd or indecent...or which tends to the corruption of the morals of youth..." 13-2801 | | | | | | | | | | |
| **VIRGINIA** | | | | | | | | | | |
| 18.1-227 et seq.<br><br>May be enjoined 18.1-236.3 | | Indecent exposure 18.1-214<br>18.1-236 to Child 18.1-214 | Nudity: see obscenity definition 18.1-227 Sexual Displays 27-416 A-G | Obscenity injunction 18.1-236.3 Municipal Power 15.6 | Swearing 18.1-237 et seq.<br><br>Telephone 18.1-238 | 18.1-187 | 18.1-188 Cohabitation, 18.1-193 | ? | 18.1-191 | 18.1-194 et seq. |
| Obscene defined: "...that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." 18.1-227 | | | | | | | | | | |
| **WASHINGTON** | | | | | | | | | | |
| 9.68.010 et seq.<br><br>"Erotic material" defined 9.68.050<br><br>Placing "adults only" label 9.68.060 (3) (a)<br><br>Comic books 7.42.010 et seq. | Lewdness 9.79.120<br><br>Sale of lewd publication 10.37.130<br><br>Nuisance: 7.48.050<br><br>Injunction 7.42.010 | Indecent exposure 9.79.080<br>9.79.120<br><br>Indecent articles 9.68.030 | | Nuisance: "offend public decency" 9.66.010<br><br>Nuisances: "lewdness, assignation, or prostitution" 7.48.050<br><br>Obscenity injunction 7.42.010 et seq. | Indecent or vulgar language 9.68.040<br><br>in public conveyances 9.27.030<br><br>telephone 9.61.230 | 9.79.110<br>120 | False charge of 4.24.120 | 9.79.100 | 9.79.090 | 9.79.10<br><br>Nuisance 7.48.050 |
| Obscene defined: 1. "Erotic Material": "...material... the dominant theme of which taken as a whole appeals to the prurient interest of minors in sex; which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters or sado-masochistic abuse; and is utterly without redeeming social value;..." 9.68.050 (2); 2. "Prohibited publications": "...detailed account of ...rape, carnal knowledge, seduction, adultery, sodomy or other sexual crime...or (3) Any detailed statement of any evidence of indecent, obscene or immoral acts offered in any trial...or, any...account of the actions of any public prostitute (except committed; public welfare)..." 9.68.020 | | | | | | | | | | |
| **WEST VIRGINIA** | | | | | | | | | | |
| 61-8-11<br><br>Penalty to corrupt youth 61-8-11<br><br>Pornographic publications 5-4-10 61-8-3<br><br>Obscene defined: "...obscene language...or description manifestly tending to corrupt the morals of youth...or public morals..." 61-8-11 | Lewd and lascivious cohabitation 61-8-4<br>open and gross lewdness<br><br>Nuisance; Lewdness 61-8-1 | Indecent exposure 61-8-20<br><br>Immoral shows prohibited -fairs- 19-7-8 | | Equitable remedies in aid of chastity, morality and decency: Article 9 61-8-1 et seq.<br><br>Nuisance: "lewdness, assignation, or prostitution" 61-8-1 | Profanity, obscene, indecent or vulgar language (& telephone) 61-8-16<br><br>Profane swearing 6-10-15 | 61-8-3 | 61-8-3-<br><br>Lewd and lascivious cohabitation 61-8-4- | Crimes against nature 61-8-13 | 61-8-12 | 61-8-5 et seq.<br><br>Nuisance 61-8-1 |

| OBSCENITY | LEWDNESS | INDECENCY (Indec. Ex.) | NUDITY | MORAL NUISANCE | OBSCENE LANGUAGE | ADULTERY | FORNICATION | SODOMY | INCEST | PROS TI |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | WISCONSIN | | | | | |
| 944.21<br>.33<br>.23 | Lewd and lascivious behavior: "sexual gratification in presence of others; or publicly exposes sex organs; or openly cohabits with one not his spouse" 944.20<br><br>Nuisance lewdness 280.09 | Makes lewd, obscene or indecent drawings 944.23<br><br>Indecent exposure 944.20 et seq.<br><br>Indecent articles 450.11 | Nudity defined: 944.21 (1) (b)<br><br>Nudity (minors) 944.21 (1) (f) (i) | Nuisance: "...any source of filth or cause of sickness..." 146.14<br><br>Nuisances: "lewdness, assignation, or prostitution," 280.09 | telegraph or telephone 196.625 | 944.15 | 944.15 | 944.17 | 944.06 | 944.3 et se<br><br>Nuisa 280.0 |
| Obscene defined: "...lewd, obscene or indecent..." 944.21 | | | | | | | | | | |
| | | | | | WYOMING | | | | | |
| 6-103<br>104 | Defined: 6-99<br><br>Nuisance 7-453 | Indecent exposure 6-102<br><br>Indecent matter in pleading W.R.C.P., Rule 11 (a)<br><br>Offenses as to schools 21-36 | | Nuisances: "lewdness, assignation, prostitution, or gambling ..." 7-453 454<br><br>Protection of minors 14-12<br><br>Public nuisance defined "house of ill fame, prostitution, gambling, (illegal) liquor..." 6-107 | Uttering obscene or licentious language in public 6-102 | 6-95 | 6-95 | 6-98 | 6-95 | 6-97 et se<br><br>Nuisa 7-45<br><br>6-107 |
| Obscene defined: "...obscene, lewd, indecent, or lascivious (matter)...or article of indecent or immoral use..." 6-103 | | | | | | | | | | |

# APPENDIX C

## TIME-MOTION STUDY* OF FILM "ANIMAL LOVER"**

C-1 thru C-22

*A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner.

**Exhibited at Old Chelsea Theatre, Denver, Colorado on July 18, 1972. See Footnote 7.

"ANIMAL LOVER"
(Part 1 of 11 Parts)

Exhibited at Old Chelsea Theater,
Denver Colorado on July 18, 1972.
See footnote 7.






Credits 1-16; interviews on street 17-27; photographs of pornography in print 28-44; interviews 45-47; interviews on farm 48-60.

"ANIMAL LOVER"
(Part 2 of 11 Parts)

Exhibited at Old Chelsea Theater,
Denver Colorado on July 18, 1972.
See footnote 7.





Interviewer interviews female "animal lover" in Denmark in outdoor sceen 61-112; female sits on floor with dog and starts to undress 113-120.

"ANIMAL LOVER"
(Part 3 of 11 Parts)

Exhibited at Old Chelsea Theater,
Denver Colorado on July 18, 1972.
See footnote 7.





Female, sitting on floor, exposes her vagina to dog's face 120-180.

"ANIMAL LOVER"
(Part 4 of 11 Parts)

Exhibited at Old Chelsea Theater,
Denver Colorado on July 18, 1972.
See footnote 7.





Dog's face in area of female's vagina 181-190; female masturbates dog's penis 191-211; female places dog's penis in her mouth 212-240.

"ANIMAL LOVER"
(Part 5 of 11 Parts)

Exhibited at Old Chelsea Theater,
Denver Colorado on July 18, 1972.
See footnote 7.





Female places dog's penis in her mouth 241-243; female masturbates dog 244-251; female places dog's penis in her mouth 252-263; female masturbates dog 264-288; female straddles dog and places dog's penis in her vagina area 289-293.

"ANIMAL LOVER"
(Part 6 of 11 Parts)

Exhibited at Old Chelsea Theater,
Denver Colorado on July 18, 1972.
See footnote 7.





Female straddle dog with vagina over dog's penis 301-311; female masturbates dog's penis 312-340; female places tongue on dog's penis 342-350. female masturbates dog's penis 351-357; interview 358-360.

"ANIMAL LOVER"
(Part 7 of 11 Parts)

Exhibited at Old Chelsea Theater,
Denver Colorado on July 18, 1972.
See footnote 7.





Interviews 361-367; nude female lies on floor alongside pig with her vagina opposite his penis 368-391; female places pig's penis in her mouth 392-420.

"ANIMAL LOVER"
(Part 8 of 11 Parts)

Exhibited at Old Chelsea Theater, Denver Colorado on July 18, 1972. See footnote 7.





Female places pig's penis in her mouth 421-424; female lies alongside pig 425-434; female sitting on floor exposes her vagina to pig's snoot 435-466; interviews 467-480.

"ANIMAL LOVER"
(Part 9 of 11 Parts)

Exhibited at Old Chelsea Theater, Denver Colorado on July 18, 1972. See footnote 7.





Interviews 480-492; female outdoors with horse 493; female masturbates horse's penis 493-500; female places horse's penis in her mouth 501-506; female masturbates horse 507-521; female undresses 522-528; female, now nude, masturbates horse 529-532; female faces away from horse and places horse's penis in contact with her anal area 533-540.

"ANIMAL LOVER"
(Part 10 of 11 Parts)

Exhibited at Old Chelsea Theater,
Denver Colorado on July 18, 1972.
See footnote 7.





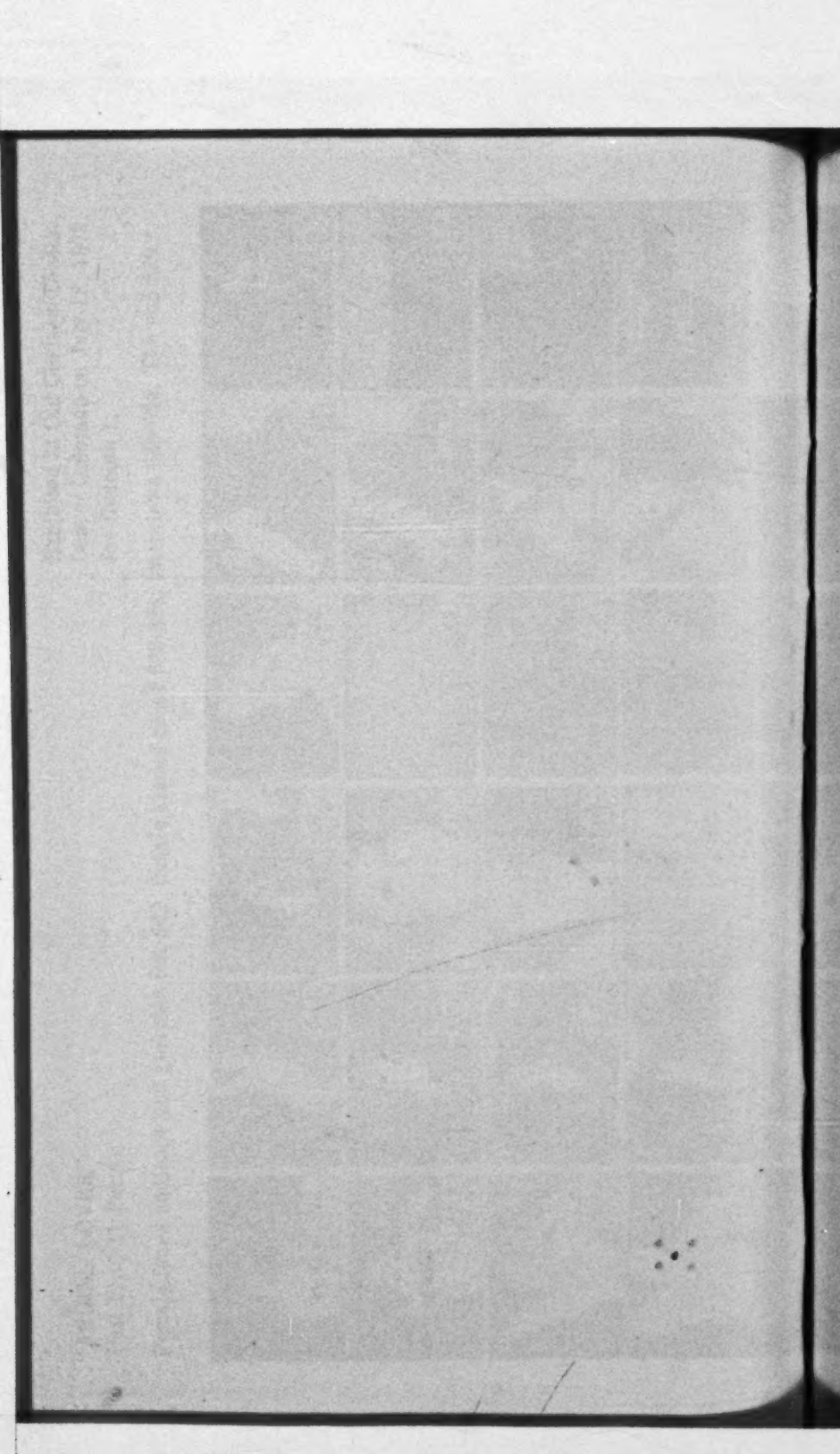
Horse's penis in contact with female's anal area 541-547; female faces horse and places horse's penis in contact with her vagina 548-557; female places horse's penis in her mouth 558-575; female places plastic container over horse's penis and camera photographs horse's ejaculation 576-600.

"ANIMAL LOVER"
(Part 11 of 11 Parts)

Exhibited at Old Chelsea Theater, Denver Colorado on July 18, 1972. See footnote 7.

Female faces audience and gestures 601-622; female kisses horse 623-624; interviews 625-628; The end 629.





# APPENDIX D

## TIME-MOTION STUDY* OF FILM "DEEP THROAT"**

D-1 thru D-28

*A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner.

** Exhibited generally in U.S. and at the New Plaza, Washington, D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City, during the period Aug. thru Nov. 1972. See Footnote 8.

"DEEP THROAT"
(Part 1 of 14 Parts)

Plaza, Wash., D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.





Producer's Editorial Comment 1-4; Opening scenes 5-9; Credits. In background Linda Lovelace drives her car home; car pulls into driveway 10-56; Linda enters house 57-61; Linda's roommate, Joan, is seated on a table with her legs outspread. A male is performing cunnilingus 62-72.

"DEEP THROAT"
(Part 2 of 14 Parts)

Plaza, Wash., D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.





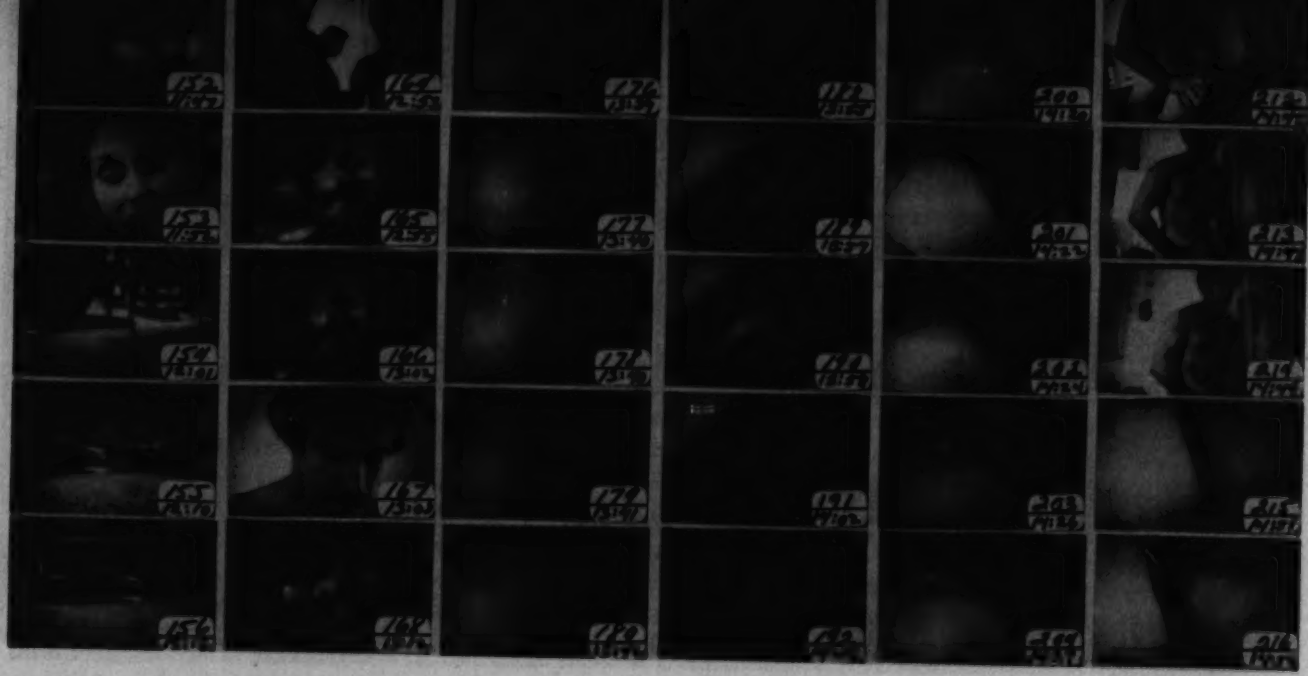
Cunnilingus; Joan asks male companion "Mind if I smoke while you're eating?" Male companion, "Not at all." 73-81; Linda leaves 82-84. Cunnilingus resumed, with camera focusing on vagina and facial expressions of Joan 85-121; at poolside 122-128; Linda complains to Joan about the way they live, "There's got to be more to life than just screwing around." 129-144.

POOR COPY

**"DEEP THROAT"**
(Part 3 of 14 Parts)

and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.





Poolside conversation, Linda tells Joan she doesn't enjoy it. She doesn't hear bells ringing or bombs going off. Joan replies, "Maybe you're not doing it right." 145-153; car approaches with two males 154-156; Males are greeted by Joan 157-160; Joan: "You have eleven . . . you have twelve." 161-162; "Have a drink, relax, wait til your number is called . . . . Everybody gets a little piece of this action." 163-164; Male performs sodomy on Linda 165-199; male penis ejaculates on buttocks 202-207; sodomy resumed 209-216

"DEEP THROAT"
(Part 4 of 14 Parts)

Exhibited generally in U.S. and at the New Plaza, Wash., D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.

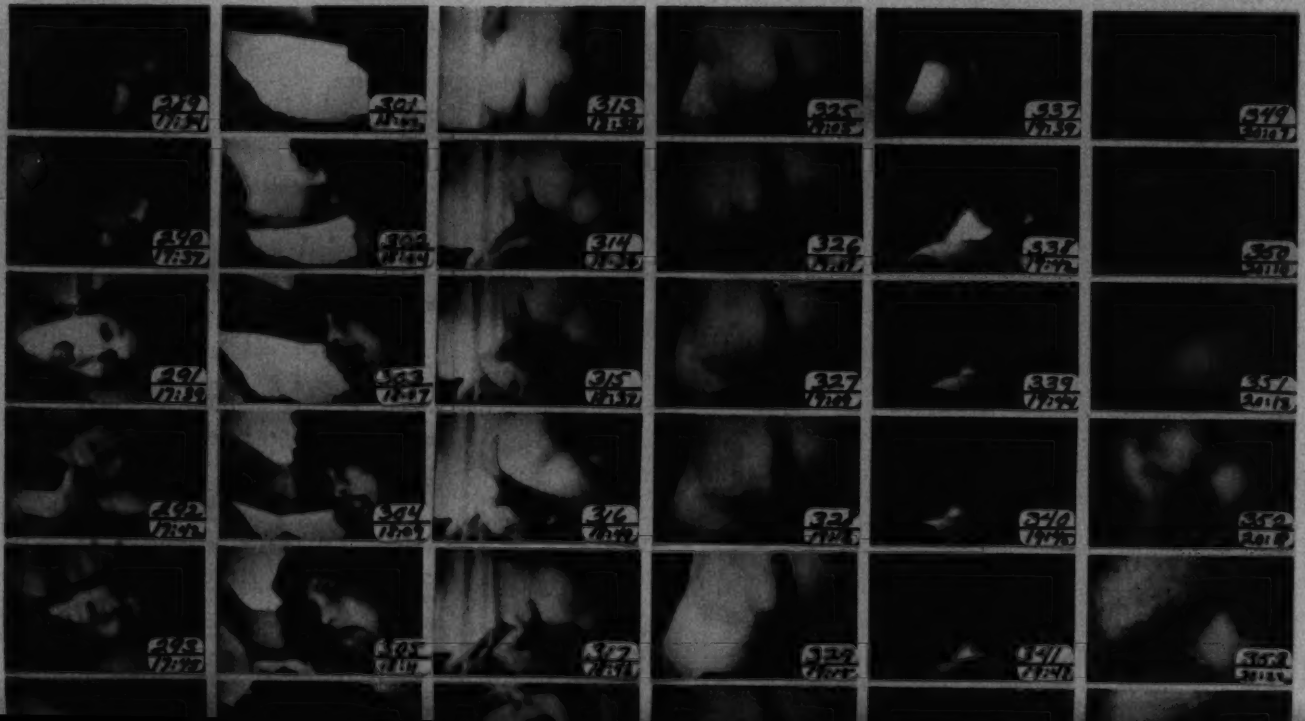


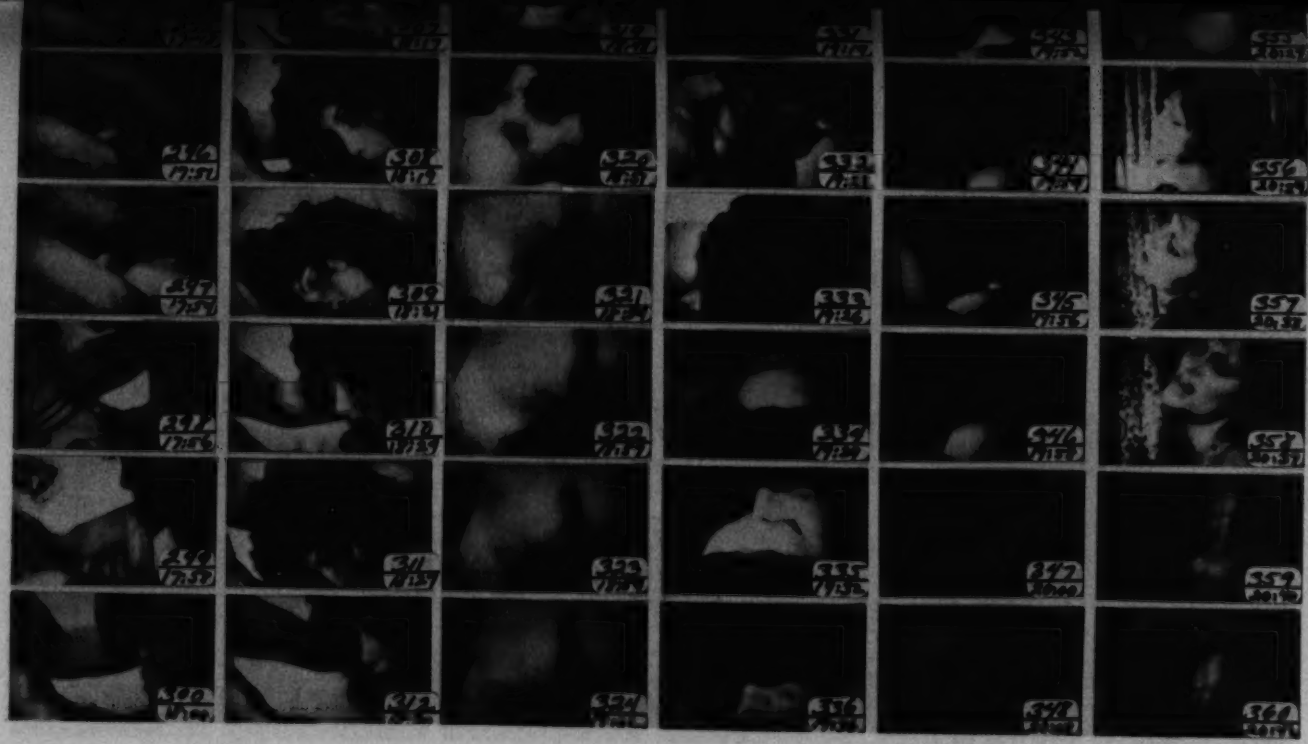


Anal sodomy on female 217-222; oral sodomy by female 223-234; anal sodomy on female 245-264; oral sodomy by female 265-268; cunnilingus 271-279; oral sodomy by female 282-288.

**"DEEP THROAT"**
(Part 5 of 14 Parts)

Exhibited generally in U.S. and at the New Plaza, Wash., D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.





Oral sodomy by female 289-290; sexual intercourse 291-297; oral sodomy by female 298-312; cunnilingus 313-319; sexual intercourse, male standing 321-355; sexual intercourse, female on top 356-360.

"DEEP THROAT"
(Part 6 of 14 Parts)

Plaza, Wash., D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.





Sexual intercourse, female on top 361-366; Linda complains. Joan suggests she visit psychiatrist 372-375; Linda discusses problems with psychiatrist at his office 376-379; Linda wants more than tingles and to hear bells ringing and bombs bursting 380-391; doctor gives Linda internal examination; discovers she has no clitoris 392-410; doctor asks what excites her most. Linda replies "giving head" and that the excitement is in her throat 410-420; doctor tells Linda her clitoris is at the bottom of her throat 421-425; doctor: "We have the problem

"DEEP THROAT"
(Part 7 of 14 Parts)

Exhibited generally in U.S. and at the New Plaza, Wash., D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.





Linda: "I try, but I choke." Doctor: "You have to learn to relax your muscles." 433-440; Linda performs oral sodomy on psychiatrist 441-497; Linda hears bells while performing sodomy 498-504.

"DEEP THROAT"
(Part 8 of 14 Parts)

Exhibited generally in U.S. and at the New Plaza, Wash., D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.





Oral sodomy 505-507; bells ringing 508; oral sodomy 509; rockets bursting 510-511; oral sodomy 512-521; rockets taking off 522; oral sodomy 523; rockets taking off 524-526; bells ringing 527-528; oral sodomy 529-551; rockets bursting 552; oral sodomy 553; Linda tongues erect penis 554-558; Linda asks doctor to marry her 559-562; doctor refuses but offers her position in his office 563-569; Linda becomes a nurse in office 571-576.

**"DEEP THROAT"**
(Part 9 of 14 Parts)

Exhibited generally in U.S. and at the New Plaza, Wash., D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.





Linda visit patient 577; patient undresses 578-585; patient sits on table and Linda performs oral sodomy 586-591; patient, standing, has intercourse with Linda, sitting on table 593-607; patient pours Coke on vagina and drinks Coke with straw 608-615; psychiatrist dictates report on male patient (who has obsession as to whether things really do go better with Coke) as blond nurse performs oral sodomy on psychiatrist 616-619; sexual intercourse between Linda and patient as patient sips through straw 620-628; Linda

"DEEP THROAT"
(Part 10 of 14 Parts)

Exhibited generally in U.S. and at the New Plaza, Wash., D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.





Linda at residence 649-651; patient is male widower who has pains in groin from sexual abstenance 651-656; Linda undresses to relieve him of his pain 656; as Linda leaves, patient tells her he wants further treatment, money is no object for he has Blue Cross 657-661; Linda treats another patient 662-667; psychiatrist dictates report (on his own case history and relations with Linda and blonde nurse) while performing anal sodomy on blonde nurse 668-682. Linda treats second patient 683-698; blonde

POOR COPY

**"DEEP THROAT"**
(Part 11 of 14 Parts)

and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.





Linda removes bandage from penis 721-729; camera shifts alternately to sexual activity of blonde nurse and Linda; psychiatrist performing anal sodomy on blonde nurse 730-736; Linda performing oral sodomy on patient 737; blonde nurse performing oral sodomy on doctor 738; Linda performing oral sodomy on patient 739-741; blonde nurse performing oral sodomy on psychiatrist 742-745; intercourse, female on top 750-751; oral sodomy by Linda 752; intercourse, female on top 753-756; oral sodomy by Linda on patient 760-770; sexual intercourse, male on

**"DEEP THROAT"**
**(Part 12 of 14 Parts)**

Plaza, Wash., D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.





Oral sodomy by Linda on psychiatrist 793-819; sexual intercourse 820-830; Linda performs oral sodomy 831-836; male in mask enters Linda's residence and watches her shave her pubic area 841-864.

"DEEP THROAT"
(Part 13 of 14 Parts)

Exhibited generally in U.S. and at the New Plaza, Wash., D.C. during Sept.-Oct. 1972 and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.

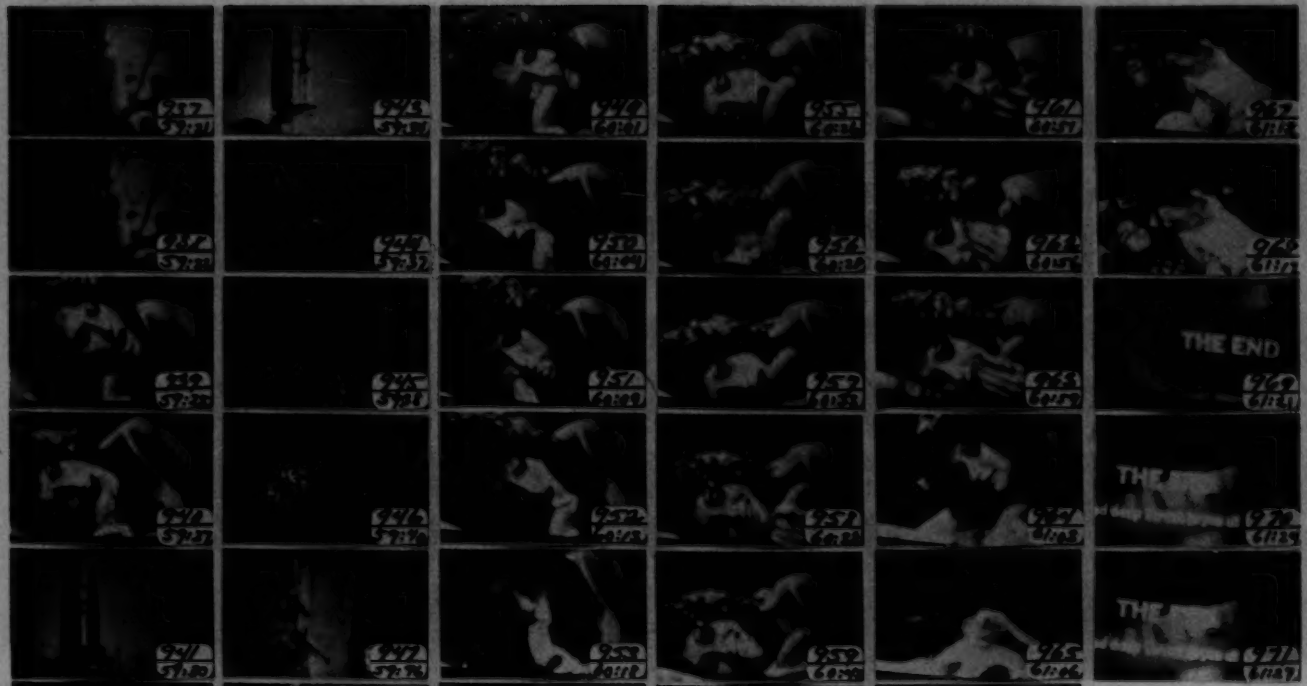




Psychiatrist performs cunnilingus on blonde nurse as nurse dictates case history of patient; Linda is now treating (patient is only sexually aroused when his sexual partner is in fear of being raped) 865-867; Linda leaves bathroom and is met by masked intruder Wilbur; Linda indicates willingness and frustrates Wilbur 868-883; Linda tells Wilbur she is really attracted to him 884; Wilbur proposes marriage 885; Linda tells Wilbur the man she marries must "have an 8-inch cock" 886-892; Wilbur phones doctor Young 893-898; Wilbur tells Linda the doctor

**"DEEP THROAT"**
**(Part 14 of 14 Parts)**

and at the World Theatre, New York City during the period Aug. thru Nov. 1972. See footnote 8.




Bells ring 957-963; as Linda performs oral sodomy 960-840; rockets ascend, bells ring, rockets burst 841-846; as Linda continues oral sodomy 840-964; Linda and Wilbur lie side by side 965-

## APPENDIX E

## TIME-MOTION STUDY* OF FILM "STICKY SITUATION"**

E-1 thru E-30

*A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner.

**Exhibited generally in U.S. and at the Playhouse, Washington, D.C. during Sept.-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See Footnote 8.

"STICKY SITUATION"
(Part 1 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.





Credits 1-7; Mary, manager of motel, shows Paul room 8-9; Throughout film, sound track presents off stage voices which tell one story – screen depicts activities which parallel story being "told" off stage, voices of "Paul" and "Mary" tell story; Motel manager Mary put Paul in a room with a two-way mirror which permitted him to look into the room which Mary shares with Lyn. Lyn enters and disrobes 11-34. Paul watches as she

"STICKY SITUATION"
(Part 2 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.





Mary enters from shower and commences lesbian activities with Lyn 73-102; Cunnilingus by Mary on Lyn 102-103; lesbian love 104-120; cunnilingus by Mary on Lyn 121-144.

"STICKY SITUATION"
(Part 3 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.





Cunnilingus by Mary on Lyn 145-153; off stage voice of Paul tells his problems; he is a voyeur who is unable to perform sexually. Lyn and Mary try to cure him; Paul watches TV with Lyn 164-165; Jesus, Mary and Lyn's friend (unknown to Paul) enters, ties Paul to a chair and gags him (167-178) at knife point, Mary is forced to disrobe 178-186; intercourse 187-193; cunnilingus on Mary 194-196; fellatio by Mary 198-216

"STICKY SITUATION"
(Part 4 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.





Fellatio by Mary 217-232; intercourse between Mary and Jesus as Paul watches 234-260; Jesus unties Paul and shakes his hand 268-275; female makes up bed 276-288.

"STICKY SITUATION"
(Part 5 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.





Off stage voice of Mary tells of her attempt to arouse Paul sexually (via the two-way mirror) by exposing herself in sexual activity. During the off stage converation, screen shows Mary arousing herself sexually by self stimulation 293-350.

"STICKY SITUATION"
(Part 6 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.



E-12



Female makes up bed 361-363; off stage voices of Mary and Paul discuss Paul's attempt to "make it with Mary"; on screen, Paul sits on bed next to Mary 364-370; Mary takes out electric vibrator and places it at her vagina with other hand on Paul's genital area 371-377; Mary helps undress Paul 383-399; Mary undresses 400-408; Mary performs fellatio on Paul 409-417, using the vibrator on her vagina 420-423; Paul feels "left out" and turns on

"STICKY SITUATION"
(Part 7 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.



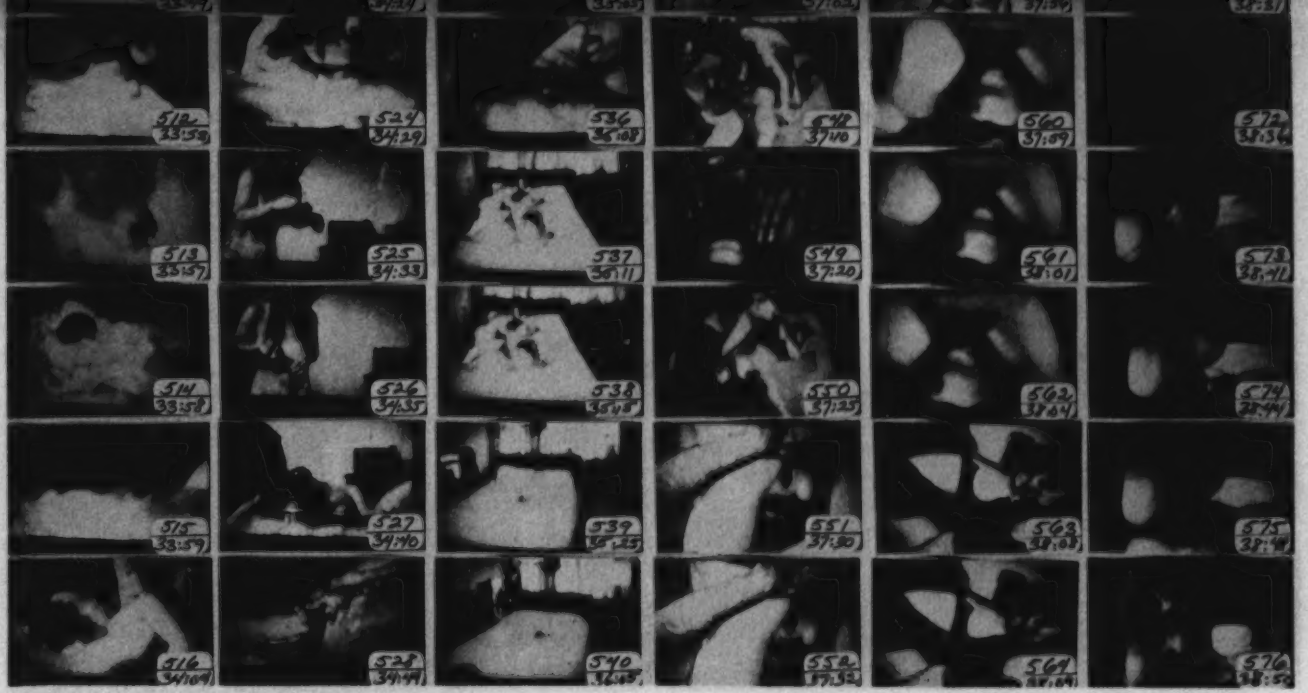


Mary continues masturbation with vibrator 433-462; Female makes up bed 463-471; Paul joins Mary on bed and sprays her nude body with whip cream 476-504.

"STICKY SITUATION"
(Part 8 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.





Paul eats whip cream from Mary's body 505-513; cherry from vaginal area 514-518; Mary sprays Paul's genitals with whip cream 519-526 and eats the whip cream 527-538; Female changes bed clothes 539-541; Paul lies on bed nude with Mary and Lyn alongside 542; Mary performs fellatio 544-547; Lyn straddles Paul with her buttocks in his face 548; Paul performs cunnilingus on Lyn 549-552; Mary performs fellatio on Paul 553-555; Lyn undresses while Paul performs cunnilingus. Mary undresses while performing fellatio 563-568; Mary places penis

"STICKY SITUATION"
(Part 9 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.





Paul performs cunnilingus on Lyn as Mary moves against his penis 577-594; Paul is unable to perform sexually; "Sorry girls – it's just like the other time" 595; Female makes up bed 596-603; off stage voices of Mary and Lyn discuss Paul's reaction as he watched "Maggie" perform with a negro, Simon. Paul tells Lyn and Mary his problems started after he came unexpedtedly upon the girl he was living with performing sodomy on a negro. "On screen," Maggie is in bed with negro Simon 604-619; Simon whips her 620-622; Maggie performs fellatio on negro, Simon 625-648

"STICKY SITUATION"
(Part 10 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.




02-3



Sexual intercourse between Maggie and Simon 650-676; Maggie performs fellatio on negro Simon 677-693; off stage voice of Lyn tells Paul of how she met Jesus; Jesus was lying in bed in a trance 697-704; Lyn and a second female engage negro Simon in sexual intercourse as Jesus is lying in a trance on the bed 705-720.

E-21

"STICKY SITUATION"
(Part 11 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.





Lyn performs fellatio on Simon 721-726; Jesus awakes from trance 731-736; Lyn mounts Simon and engages him in sexual intercourse 737-754; Maggie performs fellatio 756-758; Simon has sexual intercourse with Maggie 761-786; Lyn performs fellatio on Jesus 788-792.

"STICKY SITUATION"
(Part 12 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.





Fellatio 793-808; Female makes up bed 809-812; Lyn engages Jesus and Paul in intercourse 813-824; Fellatio on Jesus 825-828; Fellatio on Jesus and Paul simultaneously 835-861.

"STICKY SITUATION"
(Part 13 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.





Multiple sex (orgy) 865-875; Fellatio 876-883; Intercourse by male standing 884-890; Masturbation of Penis 891-892; group sex 893-899; Masturbation using wine bottle in vagina 900-916; Cunnilingus 917-925; Masturbation using wine bottle in vagina 926-936.

"STICKY SITUATION"
(Part 14 of 15 Parts)

Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.





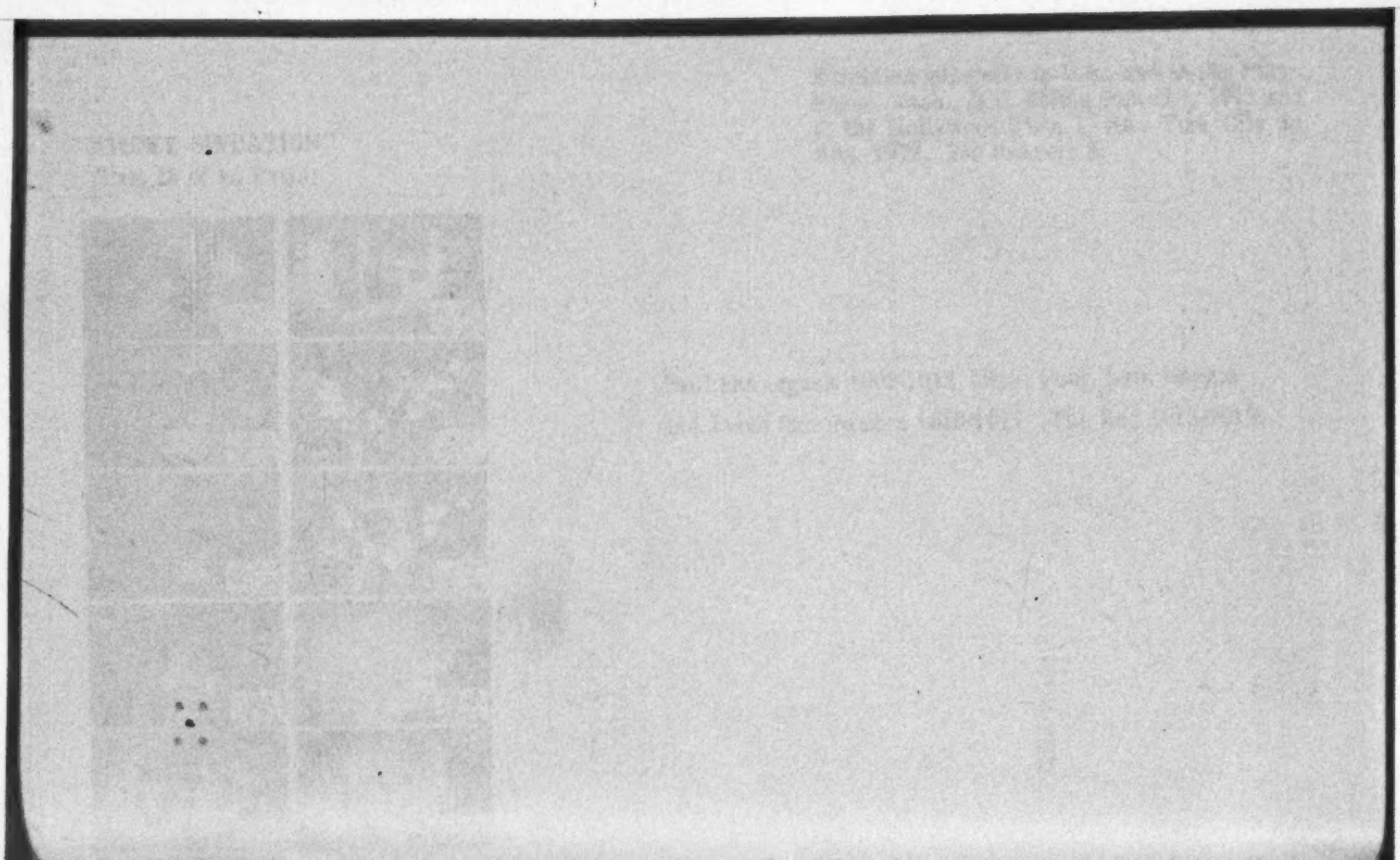
Masturbation using wine bottle in vagina 937-946; Cunnilingus 947-959; Fellatio 968-974; Maggie enters room to change bed clothes and finds Jesus in bed 975-979; Sexual intercourse between Jesus and Maggie 980-998; Fellatio 999-1008.

"STICKY SITUATION"
(Part 15 of 15 Parts)




Exhibited generally in U.S., and at the Playhouse, Wash., D.C. during Sept-Oct. 1972 and at the Hollywood Twin 1, New York City in Aug. 1972. See footnote 8.

Paul has orgasm 1009-1012; Mary, Paul, Lyn, Maggie and Jesus face camera 1016-1017. The End 1018-1019.



# APPENDIX F

## TIME-MOTION STUDY* OF FILM "ADULTERY FOR FUN & PROFIT **

F-1 thru F-26

*A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner.

**Exhibited generally in U.S. and at The Monroe Theatre, Rochester, N.Y. in March 1972. See Footnote 10.

**"ADULTERY FOR FUN AND PROFIT"**
(Part 1 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.





Credits 1-6; Richard embraces Janet in auto 7-14; Janet discusses forthcoming divorce from her husband David and expected money settlement. She worries that a private detective might learn of their activities and she would be cut off without a cent 15-28. They strip and engage in sexual intercourse 29-42. Janet performs fellatio on Richard 43-84.

"ADULTERY FOR FUN AND PROFIT"
(Part 2 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.





Sexual intercourse between Richard and Janet, Janet on top 85-103; Sexual intercourse, Richard on top 104-153; Photographer takes a surveillance picture of the sex act 154-158; Richard discusses his services with client. He seduces client's wives, photographs of sexual misconduct are used by husband to extort low money settlement, Richard gets 10%. Client says: "Now that Janet knows we've got the pictures, she's agreed to settle everything quietly – out of court." 159-168.

"ADULTERY FOR FUN AND PROFIT"
(Part 3 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.





Richard and client discuss Richard's next client 169-176 and ruse employed. Husband gets wife's purse and gives it to Richard. He phones and tells her he found it. "She comes over and we hit it off." Out of eight, he has "scored on seven of them." Next victim, Mrs. Walters arrives 177-182; He hands purse to her 183-186; After drink 187-190, they engage in intercourse 191-204; Richard performs cunnilingus 205-214; Sexual intercourse, Richard on top 215-247; Simone asks her lawyer what would happen to her settlement if she had an affair before the divorce; Lawyer: "that'd be adultery." 248-252.

"ADULTERY FOR FUN AND PROFIT"
(Part 4 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.





Simone tells her lawyer of the "lost purse" incident.253-256; Female 3 tells same lawyer a similar story – lost purse – affair – photographs. Lawyer says he would like to talk to Richard 257-261; Richard seduces another client's wife 263-275; Removes her clothing 277-288; Richard performs cunnilingus on female 289-335; Lawyer shows Richard picture he forced from Richard's photographer 336.

"ADULTERY FOR FUN AND PROFIT"
(Part 5 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.



P-10



Attorney tells Richard it is no coincidence when it happens to two of his clients. Attorney advises Richard he specializes in divorce cases "Are you reading me?" 337-340; Richard and blonde female engage in sexual intercourse 341-343; Female performs fellatio on Richard 344-420.

"ADULTERY FOR FUN AND PROFIT"
(Part 6 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.





Richard and Sylvia engage in sexual intercourse, Sylvia on top 422-499; closeup on penis and vagina 425-462; closeup on female's face registering passion 466-487; Female changes position and masturbates penis 501-503; and performs fellatio 504.

"ADULTERY FOR FUN AND PROFIT"
(Part 7 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.





Sylvia masturbates and performs fellatio on Richard 505-544; Photographer takes a surveillance picture of the sex act 545-546; Richard discusses next event – "Two chicks" 547-554; Sexual intercourse involving two couples 555-588.

"ADULTERY FOR FUN AND PROFIT"
(Part 8 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.





Intercourse between two males and two females; Female performs fellatio on Richard in shower 597-615; Intercourse between two couples standing in shower 615-626; Second female performs fellatio on second male 627-631; Both females perform fellatio on males standing in shower 632-659; Sexual intercourse on bed 660-663; Female performs fellatio on Richard on bed 664-672.

"ADULTERY FOR FUN AND PROFIT"
(Part 9 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.





Brunette performs fellatio on Richard on bed 673-680; Blonde performs fellatio on Richard standing 681-697; Richard sits on side of tub and lifts female onto his penis for intercourse, facing him 698-726; Other female sits on male and performs intercourse with her back to him 727-745; Both couples change positions and engage in intercourse with girls on top facing males 746-756.

"ADULTERY FOR FUN AND PROFIT"
(Part 10 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.





Two couples in intercourse 757-770; Male penis masturbated against female buttocks and anal area 771-783; Sexual intercourse, males on top 784-792; Female positions herself on hands and knees. Male performs intercourse from rear 793-804; Females faces register sexual reaction 805-826; Intercourse from rear continues 827-840.

"ADULTERY FOR FUN AND PROFIT"
(Part 11 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.





Intercourse continues 841-846. Photographer takes surveillance photo of sex act 847-849; Richard and the attorney argue over what is to be done. The attorney sets up another client to meet with Richard at his place 851-859 Female enters and offers $2000.00 and 10% of her divorce settlement. She wants a photograph of her husband, Sidney, who is a "rich fag." She engages Richard in sexual intercourse and performs fellatio on him 911-924.

"ADULTERY FOR FUN AND PROFIT"
(Part 12 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.



P-24



Fellatio, masturbation and sexual intercourse by female on Richard 925-957; Sidney arrives and engages Richard in homosexual act 958-963; Photographer takes surveillance photo of sex act 965; Richard is at his place 966-970. All of the female victims in the film reappear one by one. They tell Richard they are going to take him out of circulation. By keeping him busy at his pastime, he won't have enough time to take on new clients 971-1008.

"ADULTERY FOR FUN AND PROFIT"
(Part 13 of 13 Parts)

Exhibited generally in U.S. and at the Monroe Theatre, Rochester, N.Y. in March 1972. See footnote 10.



Each victim selects one day of the week 1009-1026.

# APPENDIX G

## TIME-MOTION STUDY* OF FILM "SCHOOL GIRL"**

G-1 thru G-32

*A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner.

**Exhibited generally in U.S. and at the Trans-Lux, Washington, D.C. during Sept.-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See Footnote 8.

"SCHOOL GIRL"
(Part 1 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.






Credits 1-9; Debra, age 19, sits in classroom 10; instructor gives the class an assignment. They are to do a term paper on subcultures. Students are to do original research 10-36; class is dismissed 37-41; Debra has sexual relations with fellow student George 42-72.

"SCHOOL GIRL"
(Part 2 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.





Sexual intercourse between Debra and George 73-82; Debra performs oral sodomy on George 83-93; George performs cunnilingus on Debra 98-103; simultaneous fellatio-cunnilingus 104-120; sexual intercourse with George on top of Debra 125-144.

"SCHOOL GIRL"
(Part 3 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.






Sexual intercourse with George on top of Debra 145-161; sexual intercourse with Debra on top of George 162-216.

"SCHOOL GIRL"
(Part 4 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.





Sexual intercourse with Debra on top of George 217-235; sexual intercourse with George on top of Debra 236-264; closeup of George sitting in front of Debra with erect penis 265-275; at conclusion of intercourse they discuss the term paper; Debra refuses to tell George what her topic is, "It's a secret." George gets angry 276-282. Debra gets dressed 283-288.

"SCHOOL GIRL"
(Part 5 of 16 Parts)

Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.

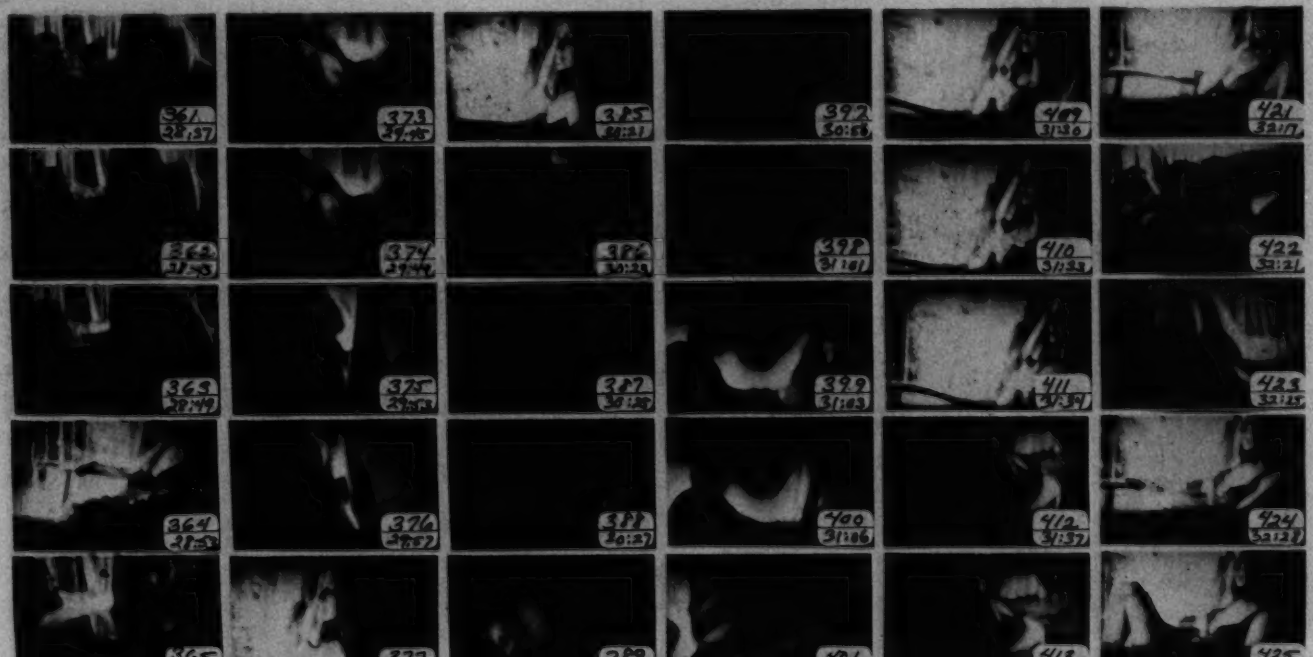




George is angry 289-293; they dress and leave 294-301; Debra meets her girl friend to discuss their day 301-305; Debra refuses to tell what her topic is 306-313; Debra looks at the ads in the "Barb" and phones 315-321; Debra discusses ad, "Couple – looking for young girl for instruction" and makes a date to meet on Friday after school 322-329; at residence of Elizabeth and Tony, Tony invites her in 330-331; Elizabeth tells what ad is about. Tony and Elizabeth have been married for 5 years but Tony has a penchant for young girls and she wants to keep him happy. There are two conditions, (1) she, Elizabeth, directs the sexual intercourse scenes and (2) Debra never sees her husband again. Elizabeth says that Debra is her present to her husband 332-348; Elizabeth directs Debra upstairs to the bedroom 349-354; Elizabeth sits in a chair and directs the sexual activity. She in-

"SCHOOL GIRL"
(Part 6 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.





Elizabeth instructs Debra 361-363; "Undo him," 364-365; following instructions, Debra takes his pants down 366-371; Elizabeth tells Debra to "give him head" 372; Debra performs oral sodomy under Elizabeth's direction 372-391; Elizabeth: "Suck his balls" 392; oral sodomy 400-413; Elizabeth tells Tony to take off his shirt and pants 414; fellatio 423-432.

"SCHOOL GIRL"
(Part 7 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.

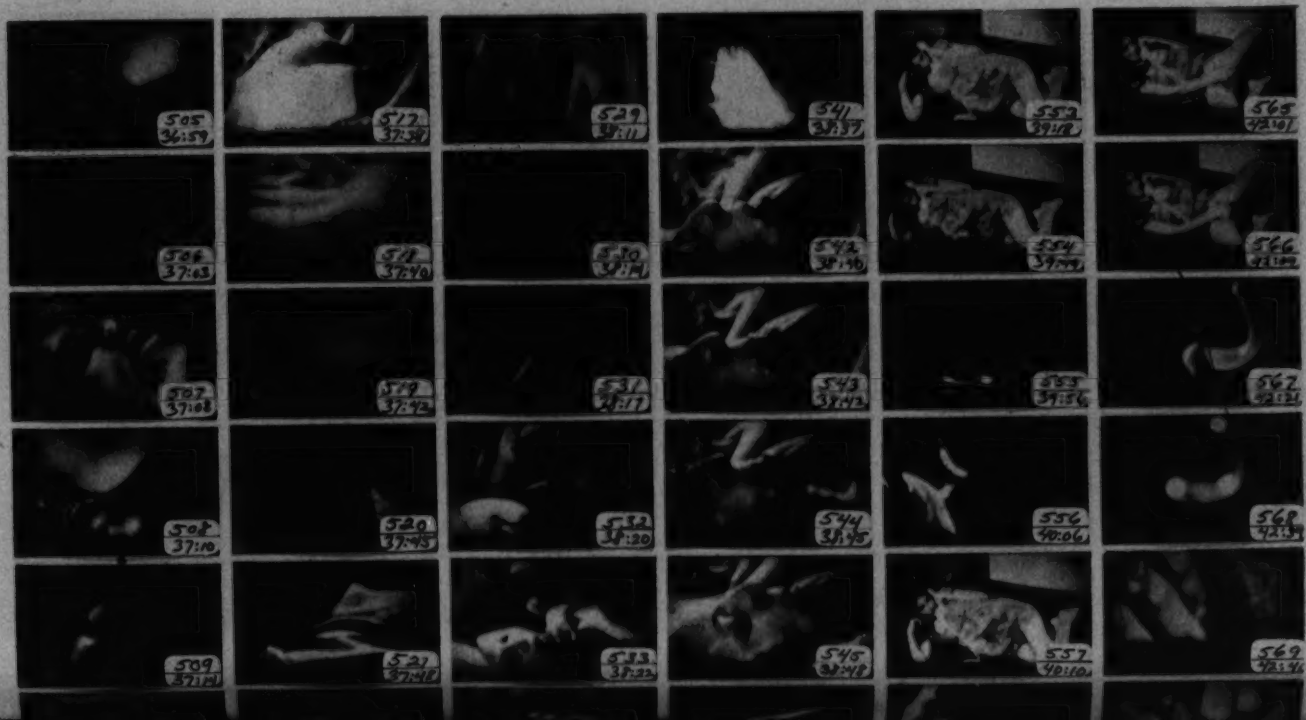




Elizabeth directs sexual activity of her husband with Debra 433-435; Debra performs oral sodomy on Tony 436-442; Debra mounts Tony 443-446; Elizabeth watches and becomes aroused 447-449; Elizabeth strips her clothing 450-453 and joins sexual activity 453-456; sexual intercourse with Tony above Debra 457-504; Elizabeth lies on the bed alongside and masturbates 466-476 as she watches intercourse.

"SCHOOL GIRL"
(Part 8 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.




C-16



Sexual intercourse, Tony on top 505-510; group sexual activity sodomy and cunnilingus on Debra 511-532; Debra performs oral sodomy on Tony 533-550; Debra makes a telephone call in response to the ad, "Are You the Girl Who Makes Obscene Phone Calls" 552-554; male voice at other end asks questions concerning what she's wearing 555-564 and instructs her to "Touch her cunt" 569-571 and "Put her finger in" 572.

"SCHOOL GIRL"
(Part 9 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.





Obscene telephone conversation continues with both parties masturbating as they carry on lewd conversation 577-648.

"SCHOOL GIRL"
(Part 10 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.





Obscene telephone caller masturbates penis 649-651; Debra phones in response to "Barb" Father and Son ad 653-654 and makes a date to be there in an hour. She picks up and looks at magazine in mailbox 655-673 and departs for date with father and son team 674. Father and son team discuss their activities with Debra, one is a shoe salesman and the other is a telephone lineman, they have been doing this for 3 years since the son got out of the army 677-683. Debra says it is the first time she has been with two men 684-689; they commence sexual activity 690-700; Debra's girl friend Susan looks at magazines 701-705; and lies on her bed reading them 706-
720

"SCHOOL GIRL"
(Part 11 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.





Susan reads magazines in her room 721-725 and becomes sexually aroused 726-744; while masturbating a knock is heard on the door 745-746 and she gets up to answer 747-748. Mr. Humphrey, the teacher, is calling to tell her he is worried about Debra and her project; while they discuss Debra's "innocence" the camera focuses on Debra in sexual relations with the father and his son 749-757, and Debra performing oral sodomy 758-760; Susan shows Mr. Humphrey some pornographic material Debra has received and they look at it together 761-776; camera shifts to sexual activity of Debra and father and son team 777-792.

"SCHOOL GIRL"
(Part 12 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.




G-24



Sexual activities of Debra and father and son team 793-805; Susan engages Mr. Humphrey in sexual activity 806-833; camera shifts to sexual activities of Debra and father and son team, Debra performs fellatio 834-836; while second member performs cunnilingus 838-843; Debra performs oral sodomy on male standing 844-846; group sexual activity 847-852; camera returns to Susan and Mr. Humphrey; Susan performs oral sodomy on Mr. Humphrey 860-864.

"SCHOOL GIRL"
(Part 13 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.

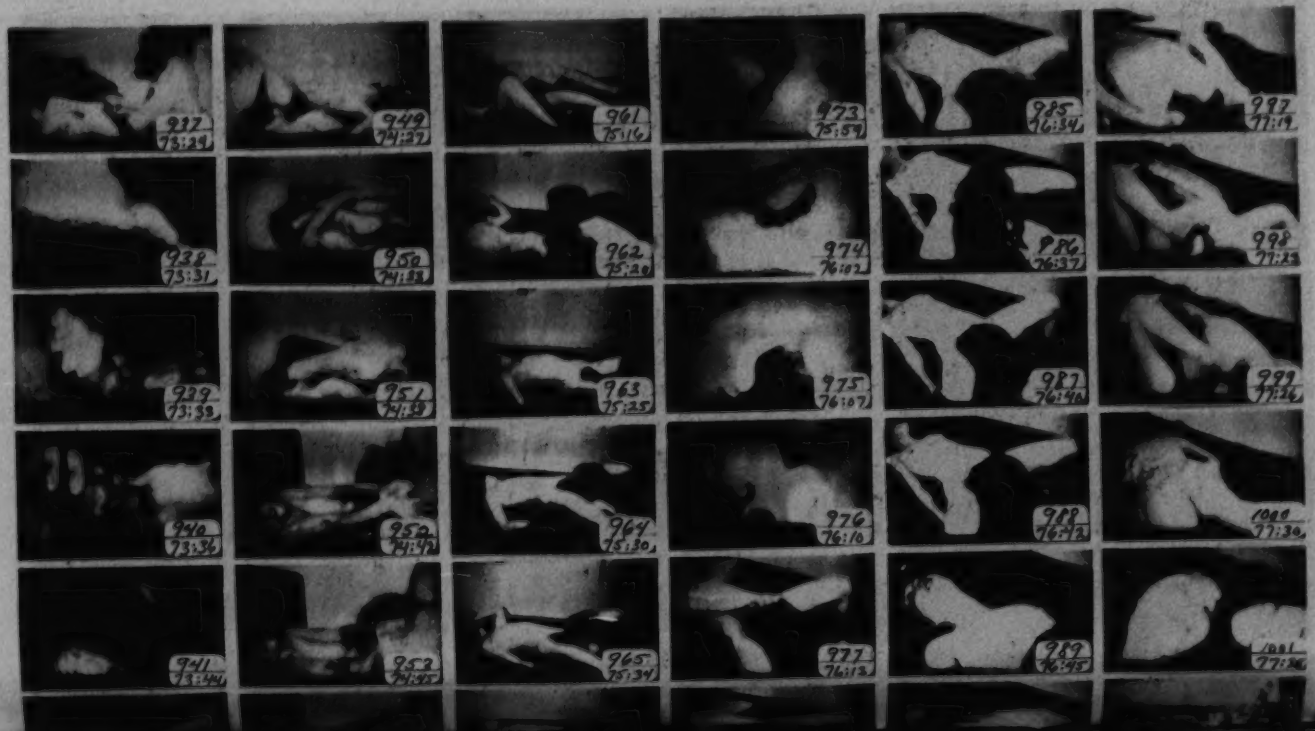


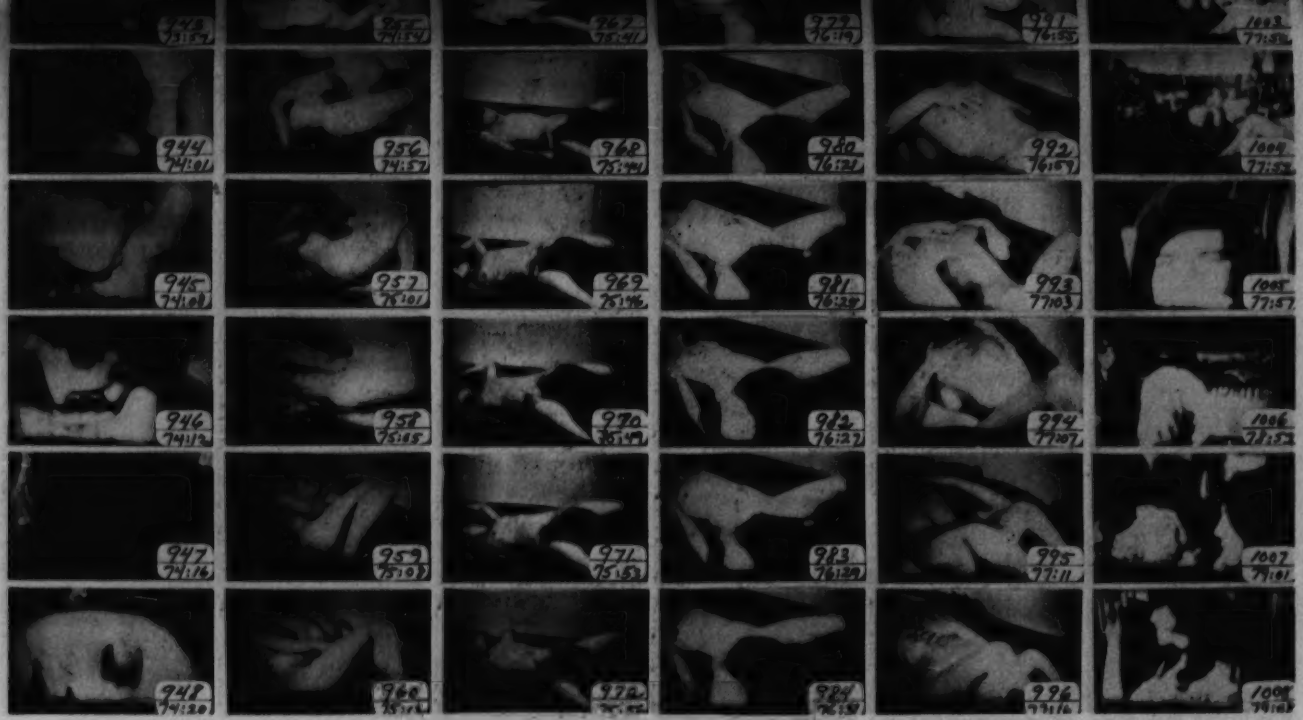


Debra performs oral sodomy 865-874; sexual intercourse between Susan and Mr. Humphrey 876-886; group sexual activity between Debra and the father son team 887-889; sexual activity between Mr. Humphrey and Susan 890-891; Sexual activity between Debra and father and son team 892-895; Mr. Humphrey leaves and asks Susan not to mention it to anyone in the class 896; Debra discusses her project with Susan, she tells her that she has had sexual activity with a husband and wife team and a father and son team 898-916; Debra kisses Susan 917-919; lesbian activity between Susan and Debra 920-936.

"SCHOOL GIRL"
(Part 14 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.





Lesbian activity between Debra and Susan 937-949; cunnilingus 950-955; lesbian activity 956-960; cunnilingus 961-990; lesbian activity 991-1000; Debra and Susan lie side by side 1001; Debra tells Susan she has been invited to an orgy party; they decide to go together; Debra and Susan arrive at the orgy party 1002-1008.

"SCHOOL GIRL"
(Part 15 of 16 Parts)

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.





Debra and Susan attend and engage in sexual activity at orgy party 1009-1080.

**"SCHOOL GIRL"**
**(Part 16 of 16 Parts)**

Exhibited generally in U.S., and at the Trans-Lux, Wash., D.C. during Sept-Oct. 1972, and at the Hollywood Twin 2, New York City in Aug. 1972. See footnote 8.




Sex orgy party 1081-1096; classroom. Mr. Humphrey, the teacher, calls on Debra to give h
Debra tells the class she has explored the sexual subculture, has looked at advertisements
paper and explored the principals and their motives, purely from an academic interest, be
that they hate what they're doing and they have a chronic search for sexual fulfillment wh
to find 1100-1108. The End 1109.

## APPENDIX H

## TIME-MOTION STUDY* OF FILM "MAGIC MIRROR"**

H-1 thru H-37

*A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner.

** Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 G.A. 343, 185 S.E.2d 768 (Nov. 5, 1971) Cert. granted in 33 L.Ed.2d 331 (June 26, 1972).

"MAGIC MIRROR"
(Part 1 of 18 Parts)

held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd 2d 331 (June 26, 1972)





Credits 1-2; female 1 browsing in antique store, purchases mirror 3-34; female 1 in her apartment 35-38; TV man arrives to do repair 39-55; female 1 enters her bedroom for purse and glances at mirror 56-60

"MAGIC MIRROR"
(Part 2 of 18 Parts)

nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd 2d 331 (June 26, 1972)





Fade to scene, female 1 and TV man, standing nude lathering each other with shave cream 61-72; female 1 and TV man lather each other, genitals and breasts 73-111; they fall to the floor and engage in sexual intercourse, female on top 113-120.

"MAGIC MIRROR"
(Part 3 of 18 Parts)

nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd 2d 331 (June 26, 1972)





Sexual intercourse, female on top 121-136; female slides back and forth over male's body 137-170; sexual intercourse, woman on top 172-180.

"MAGIC MIRROR"
(Part 4 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971)cert. granted in 33 LEd2d 331 (June 26, 1972)

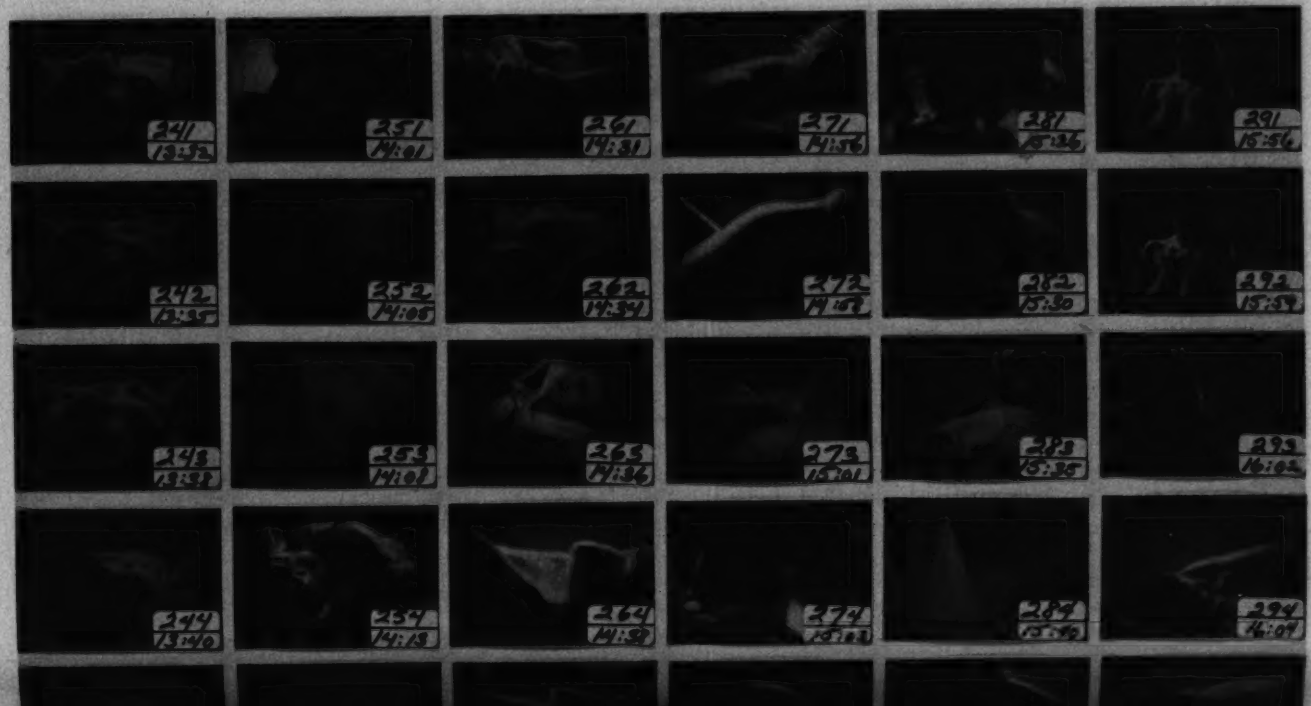




Sexual intercourse, female on top 181-194; sexual intercourse, male on top 195-240.

"MAGIC MIRROR"
(Part 5 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)





Sexual intercourse male on top 241-254; they grapple and roll over each other 254-276; sexual intercourse, woman on top 277-293; sexual intercourse, man on top 294-300.

"MAGIC MIRROR"
(Part 6 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd 2d 331 (June 26, 1972)





Simultaneous fellatio and cunnilingus 301-319; fade out to scene, female 1 pays TV man 322-329; scene shifts to female reading as doorbell rings 331-332; female 2 and female 1 of anti-smut society enter 333-353; look at mirror 354-360.

"MAGIC MIRROR"
(Part 7 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd 2d 331 (June 26, 1972)





Fade to female 2 and 3 nude 361-364; lesbian activity 364-382; female on top rubbing genitals 383-399; lesbian activity 400-408; cunnilingus 409-415; females fondle each other's breasts 416-420.

**"MAGIC MIRROR"**
**(Part 8 of 18 Parts)**

**Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd 2d 331 (June 26, 1972)**





Females fondle each others breasts 421-432; focus on anus 433-440; cunnilingus 441-453; simultaneous cunnilingus 454-480.

"MAGIC MIRROR"
(Part 9 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)



H-18



Simultaneous cunnilingus 481-493; reverse positions in simultaneous cunnilingus 494-512; rubbing of genitals 512-527; cunnilingus 528-540.

"MAGIC MIRROR"
(Part 10 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)





Cunnilingus 541-558; lesbian activity 558-583; rubbing of genitals 584-600.

"MAGIC MIRROR"
(Part 11 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd 2d 331 (June 26, 1972)




22-H



Rubbing of genitals 601-636; fade out as females 2 and 3 leave 636-640; scene shifts to bedroom, female 1 and man in full dress are dancing 641-658; both look at mirror and fade out to next activity 658-660.

"MAGIC MIRROR"
(Part 12 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)





Two nude males and two nude females are dancing 661-678; cunnilingus 678-679; fellatio 680-682; sexual embrace 682-690; cunnilingus 691-701; sexual intercourse woman on top, 702-707; sexual activity 708-720.

"MAGIC MIRROR"
(Part 13 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd 2d 331 (June 26, 1972)





Cunnilingus 721-223; sexual intercourse 724-731; cunnilingus 733; sexual intercourse, male on top 737-750; sexual intercourse, woman on top 751-756; group sex 756-780.

"MAGIC MIRROR"
(Part 14 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971)cert. granted in 33 LEd 2d 331 (June 26, 1972)





Group sex 781-792; sexual intercourse, male on top 793-833; sexual intercourse, woman on top 834; group sex 834-840.

"MAGIC MIRROR"
(Part 15 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 28, 1972)

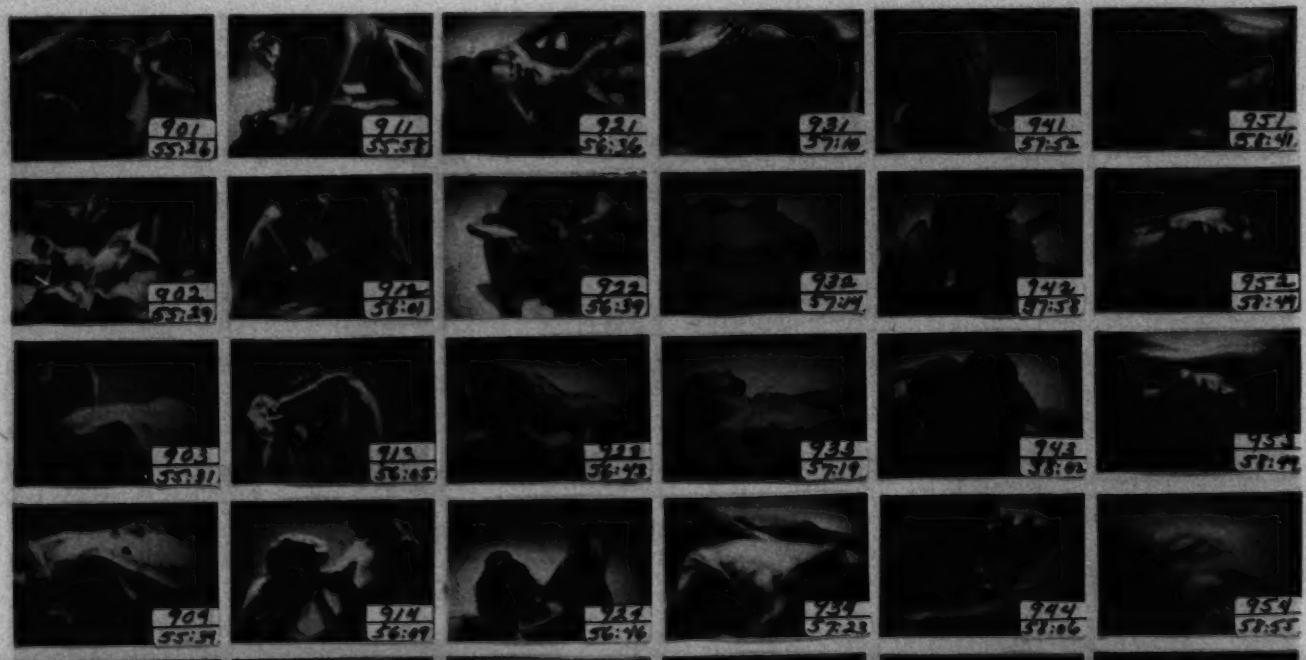




Group sex 841-853; fade to scene in apartment, male and female leave apartment dressed in formal attire 854-861; scene shifts to female 1 asleep in bed 862-864; burglar enters and rifles her purse 865-869; female awakens and burglar, using gun, forces her to lie down as he binds her hands 872-880; policeman enters and holds gun on burglar 881-887; female looks at mirror 888-889; fade to robber and policemen nude, fondling female 1, 889-900.

"MAGIC MIRROR"
(Part 16 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd 2d 331 (June 26, 1972)



H-82



Group sexual activity 901-931; robber knocks policeman out 931-933; sexual intercourse between female 1 and burglar 934-940; female on top 940-943; cunnilingus 944; sexual intercourse, woman on bottom 948-956; sexual intercourse, woman on top 958-960.

"MAGIC MIRROR"
(Part 17 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd 2d 331 (June 26, 1972)





Sexual intercourse, woman on top 961-965; sexual intercourse, man on top 966-976; sexual intercourse, lying on unconscious policeman 980-984; officer awakens 984-987; group sexual activity 987-1020.

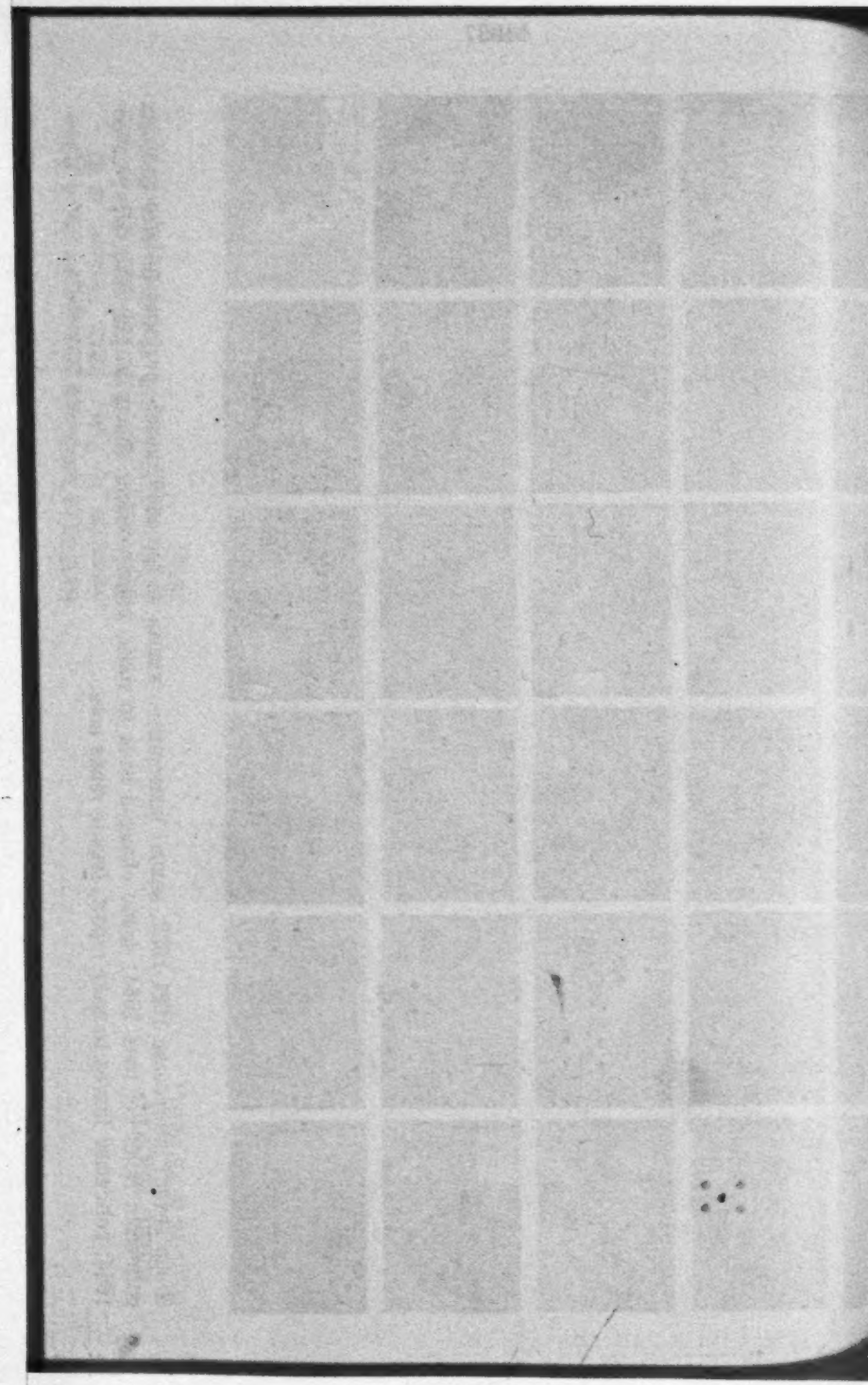
"MAGIC MIRROR"
(Part 18 of 18 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd 2d 331 (June 26, 1972)






Group sexual intercourse 1021-1032; sexual intercourse, woman on top 1049; female performs fellatio on each; policeman licks her toes 1064; scene changes back to room; police officer shoots burglar who falls to floor 1064; policeman leaves to make report; female reads note.



# APPENDIX I

## TIME-MOTION STUDY* OF FILM "IT ALL COMES OUT IN THE END" **

I-1 thru I-24

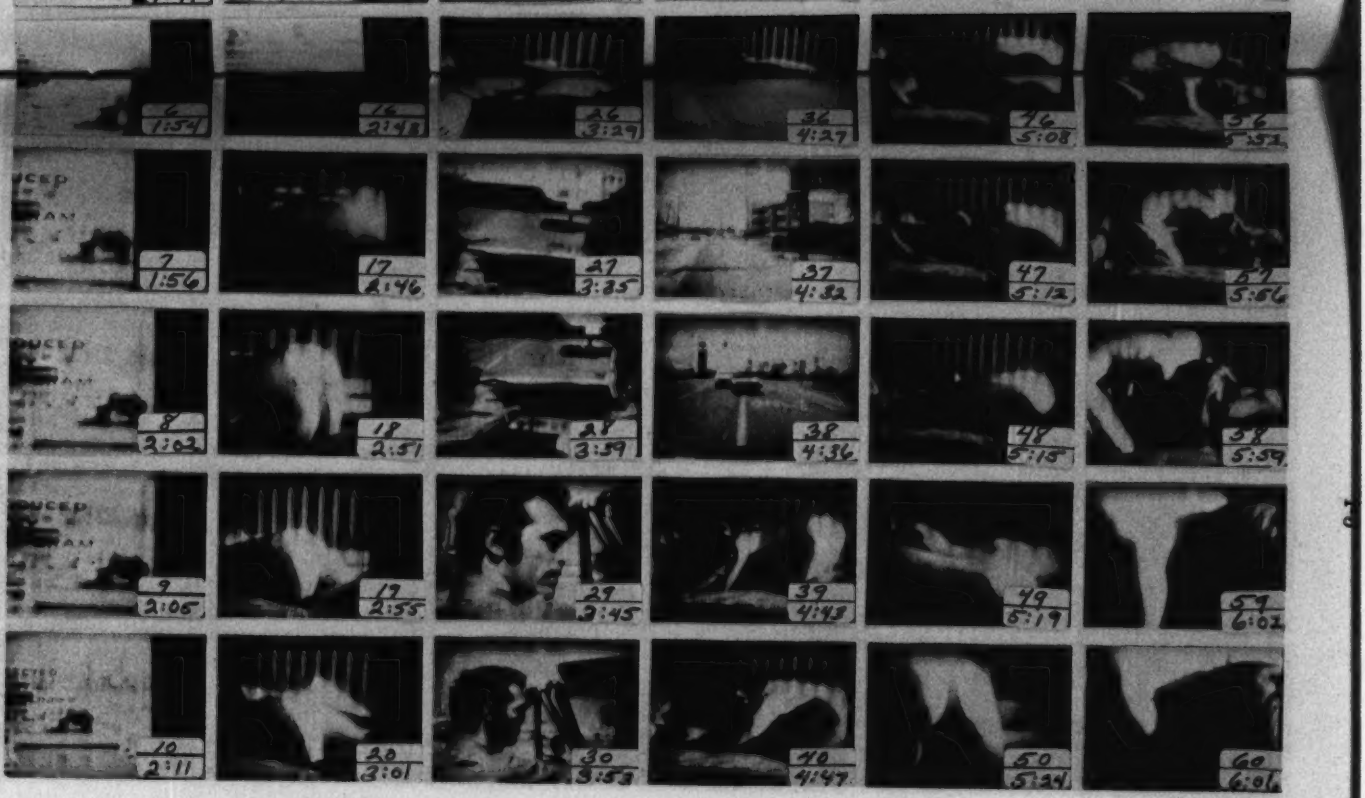
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"IT ALL COMES OUT IN THE END"
(Part 1 of 12 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd 2d 331 (June 26, 1972)

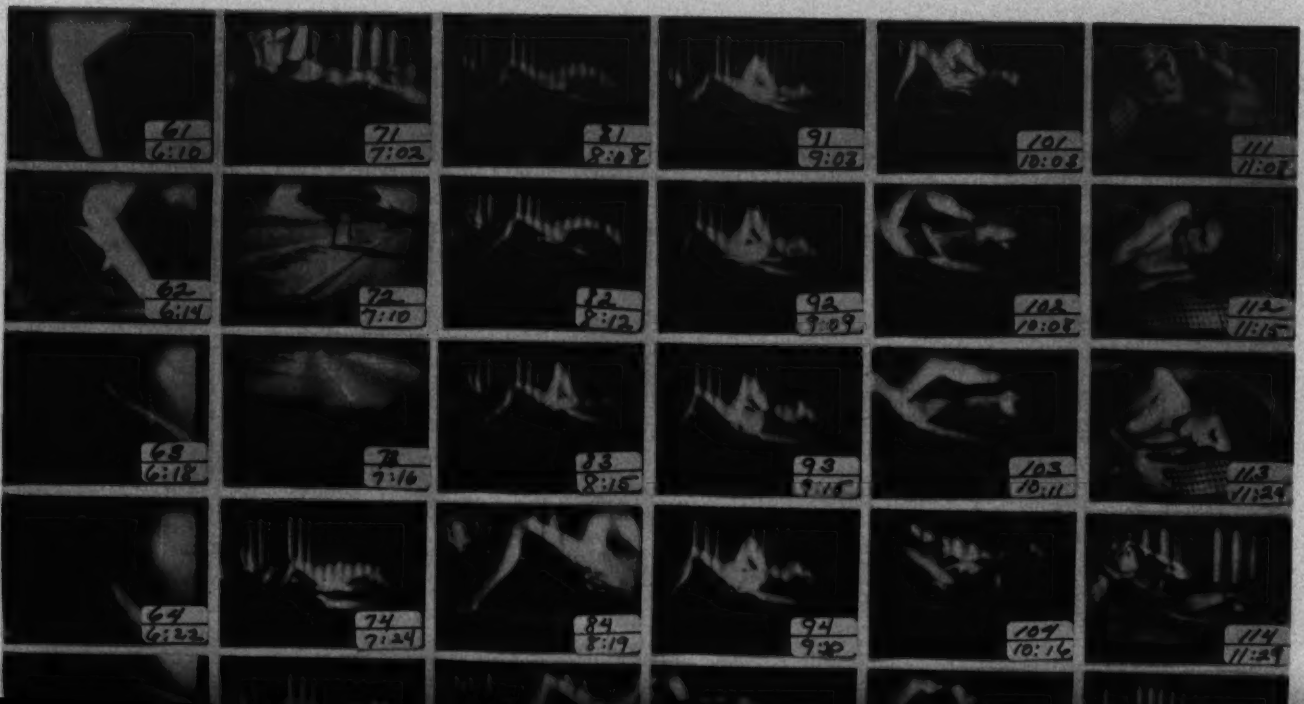





Credits 1-15; females 1 and 2 in lesbian activity 16-21; males 1 and 2 riding in auto 22; lesbian activity 23-26; males in auto 27-31; lesbian activity 32-35; males in auto 36-38; cunnilingus 39-49; double cunnilingus 50-60.

"IT ALL COMES OUT IN THE END"
(Part 2 of 12 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd 2d 331 (June 26, 1972)




1-4




Lesbian activity 61-66; males in auto 67-69; lesbian repose after climax 70-71; males in auto 73; females 1 and 2 discuss need for a man in sex life 74-117; males in auto 118; females decide to go look for men 119-120.

"IT ALL COMES OUT IN THE END"
(Part 3 of 12 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971)cert. granted in 33 LEd 2d 331 (June 26, 1972)






Females decide to go look for man 121-127; female 1 and 2 arrive at York Club Waterfront 137-156; two males and females 1 and 3 at dock area 145-157; two males arrive and go in opposite direction 158-176; female1 meets male 1.

"IT ALL COMES OUT IN THE END"
(Part 4 of 12 Parts)

nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971)cert. granted in 33 LEd2d 331 (June 26, 1972)






Female 1 invites male 1 to her apartment for coffee 180-193; female 2 (blonde) arrives with male 2 (companion of male 1) 194-209; female 2 in kitchen talks to male 2. They embrace 210-219.
Male 1 talks to female 1 and are joined by other couple 220-224; male 2 and female 1 (brunette) go into bedroom; male 2 forcibly undresses female 1 228-240.

"IT ALL COMES OUT IN THE END"
(Part 5 of 12 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd 2d 331 (June 26, 1972)





Female 2 in living room does strip tease for male 1 241-247; male 2 engages female 1 in sexual intercourse and cunnilingus 248-261; In bedroom, male 2 and female 1 engage in cunnilingus and fellatio 276-288; female 2 undresses male 1 in living room 290-296; female 1 and male 2 in sexual intercourse in bedroom 297-300.

"IT ALL COMES OUT IN THE END"
(Part 6 of 12 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)

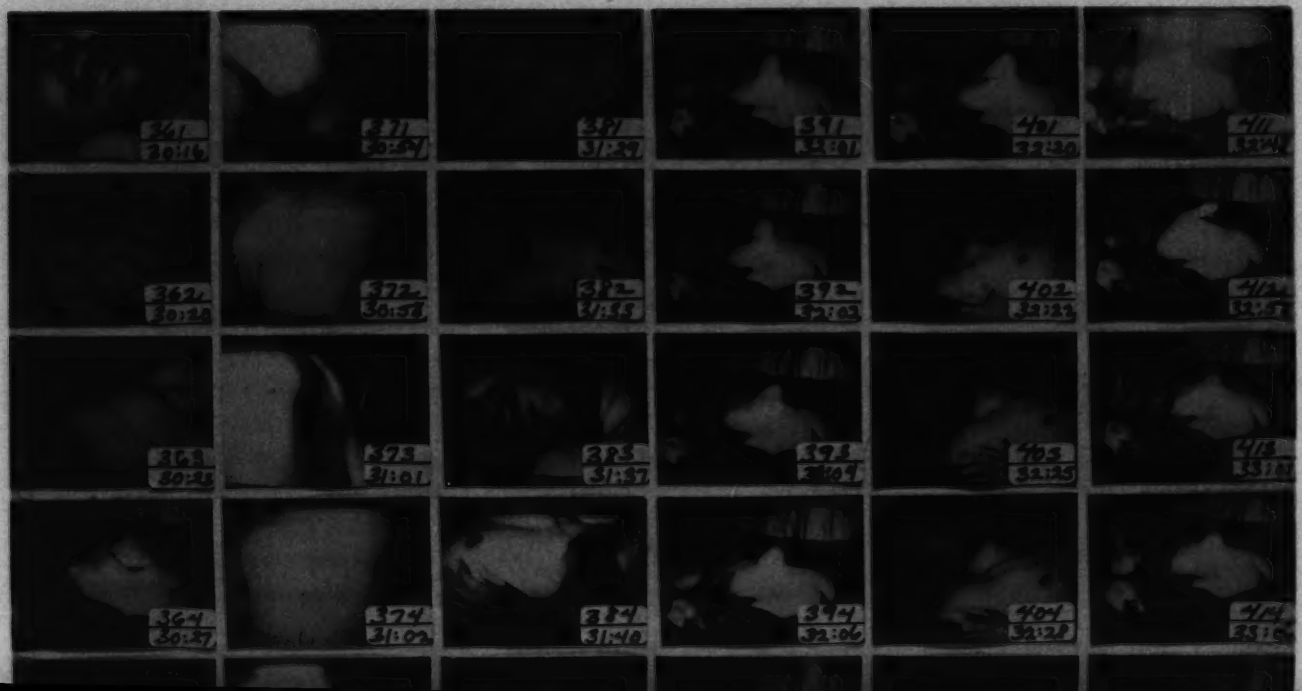




Female 2 undresses male 1 in living room 290-296; female 1 and male 2 in sexual intercourse in bedroom 297-302; female 2 mounts male 1 in living room 303-314; sexual intercourse in bedroom, male on top 315-331; female 2 undresses male in living room and starts fellatio 332-340; sexual intercourse in bedroom, male on top 341-360.

"IT ALL COMES OUT IN THE END"
(Part 7 of 12 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)





Female 2 performs fellatio on male 1 in living room 361-4 20

"IT ALL COMES OUT IN THE END"
(Part 8 of 12 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971)cert. granted in 33 LEd2d 331 (June 26, 1972)





Male 1 has climax 421-432; sexual intercourse in bedroom, male on top 433-453; in bedroom, male 2 forces female to perform fellatio 454-480.

"IT ALL COMES OUT IN THE END"
(Part 9 of 12 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd 2d 331 (June 26, 1972)





Fellatio in bedroom 481-483; sexual intercourse, male on top 484-523; sexual climax; male 2 exists bedroom and female 2 enters bedroom 524-531; male 2 joins male 1 in living room 532-540.

"IT ALL COMES OUT IN THE END"
(Part 10 of 12 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 348, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd 2d 331 (June 26, 1972)





Males 1 and 2 reach homosexual understanding in living room 541-550; females 1 and 2 engage in lesbian acts in bedroom 551-559; males 1 and 2 enter bedroom 560-565; males 1 and 2 engage females 1 and 2 in sex orgy 566-576; males perform cunnilingus on females 577-600.

"IT ALL COMES OUT IN THE END"
(Part 11 of 12 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)





Males perform cunnilingus on females 601-611; male 1 engages female 2 in sexual activity 612-621; male 2 and female have sexual intercourse, male on top 622-638; male 1 performs cunnilingus on female 2 639-641; sexual intercourse, male on top 642-660.

"IT ALL COMES OUT IN THE END"
(Part 12 of 12 Parts)

Held to be hard-core pornography and a public nuisance in Paris Adult Theatre et al v. Slaton, 228 GA. 343, 185 SE2d 768 (Nov. 5, 1971) cert. granted in 33 LEd2d 331 (June 26, 1972)



Sexual intercourse 661-667; the end 668-670.

San Francisco, Calif.
Chronicle
(Clr. D. 480,233 Sat. A.M 450,227)

JAN 16 1971

Allen's P. C. B. Est. 1888

## Prosecutor's View

# Hope for End to Bestiality Films

*By Maitland Zane*

"I think that verdict will put a stop to the animal movie movement—if there was a movement," Jerome Benson predicted yesterday.

Benson is the 31-year-old assistant district attorney who two days ago won his first conviction in a porny-movie case.

He said he was "extremely pleased" when the Municipal Court jury of six men and six women found Jackie Simpson, 41, guilty of showing an obscene film. It was the bestiality movie "Animal Lover," which stars a Danish farmgirl having sex with a dog, pig and horse.

### APPEAL

Simpson, 41, a former operator of night clubs in Texas and Colorado and present owner of the 105 Turk Street theater, is appealing the conviction, which carries a maximum sentence of six months in jail and a $1000 fine.

Benson, who makes no secret of his loathing of sex films and the people who show them, commented, "There's gotta be something wrong with a guy to show movies like that."

He continued:

"I think one of the good effects of this verdict will be that it will show the average citizen that there are laws against showing obscene material, and that the laws are being enforced.

"The verdict will also show that it's not only police officers and our office, but jurors who share this concern."

A trial date will be set later this month for Robert Hubsch who also showed a bestiality movie, "Mrs. McDonald's Farm," at his Mini-Adult theater in the Tenderloin.

But Benson said he isn't going to concentrate just on "sick sex" movies.

"I think the emphasis will continue on all forms of hard-core films," he said.

Another porny movie trial begins next week, that of attractive Arlene Elster, 29, operator of the Sutter Cinema and co-promoter of last month's First International Erotic Film Festival.

### EROTIC

Miss Elster, who said on the Dick Cavett Show two nights ago her films are "erotic" rather than "pornographic," will be the first woman to be tried for showing sex movies. Hers are hard-core as any, but she indignantly draws the line at bestiality and other bizarre perversions.

Another retrial of Gino Del Prete, 39, operator of Expo 69, is set for February 1. His first two trials ended in hung juries.

POOR COPY

RockyMtnNews
Denver,Colo.



## Seccombe pushes pornography cle an-up campaign in Denver

# A major impact from 'Animal' trial

By CECIL JONES and JEFF ROSEN
*Rocky Mountain News City Hall Reporters*

Who knows how many upstanding Denver citizens and public servants were chagrined last month when Denver Dist. Atty. Jarvis Seccombe decided it was time to clean up downtown Denver?

The target of Seccombe's attack was "Animal Lover," a 36-minute film which depicts a Danish woman in a variety of sexual escapades with three quadrupeds, to wit: A dog, a pig and a horse.

According to E. Stuart Grousseman, manager of the Old Chelsea Theater at 1433 Tremont Place, his customers include Denver police and firemen and card-carrying city employes. Two Denver judges are no strangers to his theater, he added. Of course they're all admitted free.

**WASN'T SPARED**

But Grousseman's alleged largess toward the pillars of city government failed to spare him when Seccombe, acting in the tradition of his mentor, former DA James D. "Mike" McKevitt, loosed his deputies against "Animal Lover" last month. In 1969, McKevitt tried with notable lack of success to run the film "I am Curious (Yellow)" out of town.

"Curious," one of the pioneers in X-rated movies, looks like an innocent indiscretion in Aunt Sally's garden next to the barnyard antics of "Animal Lover."

A trial to determine whether the film is obscene has been set for Oct. 16 before County Judge L. Paul Wendick. As of the weekend defense attorneys were rounding up a battery of "expert witnesses" from all parts of the country. The DA's office, meanwhile, is raring to go to trial right away. The proceedings promise to offer many interesting points.

**THREEFOLD MISSION**

Seccombe launched his war against "Animal Lover" on July 18. His deputies were given a threefold mission: Seize the film in a legally unimpeachable way, get the case beyond hearings on constitutional issues and into court, and use the ensuing obscenity trial as a precedent for future attacks on "smut peddlers."

To this end, Deputy DAs Coleman Connolly and Fred Rogers went before Wendick July 21 to ask for a court order allowing them to videotape a showing of "Animal Lover."

Three days earlier Police Officer T. W. Tabor had viewed the film and written an affidavit giving his version of what took place on the screen. Tabor's affidavit is one of the most staggering documents ever to pass through City Hall.

Armed with a videotape that included all but 12 minutes of the film, the deputies later returned to Wendick's court and convinced him there was sufficient cause to believe that "Animal Lover" was obscene under state law.

**LIGHTS WERE DIMMED**

A hearing was set for July 25 before Presiding Judge George A. Manerbino. Once again the lights were dimmed and the videotape viewed. The DAs then cleared yet another hurdle—granting of a search warrant to seize the film as evidence for a trial.

Earlier the same day Grousseman and his attorney, Leland Huttner, had told Connolly they would surrender the film voluntarily if the DA would drop the prosecution. Connolly conferred with Seccombe, who refused. When police arrived at the theater that afternoon "Animal Lover" had left for parts unknown.

Meanwhile charges of promoting obscenity and conspiracy had been filed in County Court against Grousseman and two more of Old Chelsea's corporate directors—Melvin D. Hanners

Grousseman said he was stunned by the charges. "Animal Lover" was not a morally degenerate film, he argued, but a documentary made to show acts of bestiality that have already been depicted in such noted works of literature as "the Bible" and Hitler's 'Mein Kampf.' "

The timing of Seccombe's attack on the Old Chelsea has all the earmarks of a political ploy. Draped in virtue, the fighting DA tilts with smut merchants. A superb election gambit, however trite.

**OBSCENITY STATUTE**

It's noteworthy that at every possible juncture Seccombe's deputies have stoutly refused to go along with any trial delays. Connolly denies that his haste has any connection with the Nov. 7 election, and instead advances the fairly plausible argument that the DA's office would have been busting hard-core porn houses long ago if it had been armed with the proper legal tools.

They now have these tools, Connolly says. One of them is a new obscenity statute that went into effect July 1. Another is a landmark Colorado Supreme Court decision of last Dec. 6 that laid down explicit guidelines for the seizure of allegedly obscene materials.

He has argued against all trial continuances, Connolly maintains, because the court guidelines call for a swift disposition of obscenity cases involving seized evidence. The validity of this argument would seem questionable in light of the fact the DA has seized no evidence.

Quibbles aside, however, there's little doubt that more prosecutions will follow should the new legal machinery (one City Hall cynic calls it "Seccombe's new toy") stand up in court against "Animal Lover." Rogers, Connolly's sidekick, was asked if the Old Chelsea matter was just the first chapter in the DA's drive to "clean up Denver."

"That would be a fair thing to say," he replied.

It is questionable, however, whether the DA will ever get another crack at a film in which the principal actors include a dog, a pig and a horse.

**HEADS DEFENSE**

Both sides will be armed to the teeth when the "Animal Lover" trial opens seven weeks from now before Judge Wendick. Grousseman et al have hired Arthur Schwartz, perhaps Denver's most practiced attorney in obscenity cases, to head up their defense with Huttner as co-counsel. Schwartz was in San Francisco this week lining up one of his witnesses. The DA's office, of course, has determined to go for broke against "Animal Lover."

Barring further pre-trial motions, the first order of business will be jury selection. This will be a difficult process requiring at least a full day, Huttner says, because the defense must find six jurors capable of rendering a fair and impartial verdict about a sexually explicit movie. In some obscenity cases the voir dire (questioning of potential jurors) process has included the showing of scenes clipped from hard-core movies, he explained.

**VIEW VIDEOTAPE**

Once selected, the jury presumably will have to view the videotape of "Animal Lover"—or, if it is available the color film itself. This could be highly extraordinary experience for some jurors. A visit to the jury room on the fourth floor of City Hall suggests that most persons who gather there are not patrons of "XXX"-rated movie houses, especially those exhibiting bizarre bestiality.

Potentially even more interesting than the amours of a Danish woman who prefers animals because men can't be "trusted" will be

**SEX EDUCATION COURSES**

Chief among them will be one Dr. Theodore McIlvenna (spelling provided by Schwartz), head of the Glide Memorial Methodist Foundation in San Francisco. According to Schwartz, the foundation provides sex education courses and marriage counseling.

There will be at least two more "experts," he said, possibly including a psychologist associated with "a university in Louisiana" and a Colorado College professor who shows X-rated movies to his sex education class.

These witnesses will offer "scientific evidence as to whether bestiality has an effect on the prurient interests of the average person," Schwartz said. "We don't think it does."

But the key point of his defense, Schwartz added, will be a vigorous constitutional challenge of Colorado's new obscenity statute.

The upcoming "Animal Lover" trial raises some other striking legal questions. Will the drapes be drawn and persons under 21 excluded from the courtrooms? Will there be a jury of one's peers, including a dog, a pig and a horse?

**LEGAL IMPORTANCE**

Despite their comic aspects, the proceedings against "Animal Lover" will be of serious legal importance and could have a substantial impact on theater and bookstore owners in Denver. Even if the DA fails to get a conviction, the fact that he pushed "Animal Lover" through the trial process would indicate he now has the legal machinery to get obscenity cases before a jury.

This victory could in turn produce an all-out campaign to prevent Denver citizens from exercising their choice to view or not to view hard-core pornography, as trashy or artful as it may be. Such a campaign would be applauded by some, and lamented by others.

6 1972

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# ontempt
# erm Given
# 'X' Films

By KEN PEARCE
Denver Post Staff Writer

he head projectionist of an ted Denver theatre was d in contempt of court day and sentenced to serve n days in Denver County

is William J. Stolar of Coronet St. who works at Act I & II Cinema Theatre 40 W. Colfax Ave.

unty Judge Paul Weadick ed a 15-day stay of execu- to give Stolar's attorney, Hoyman, time to file an l.

e contempt finding stems an order signed by County e George Manerbino Sept. recting operators of the re to allow representatives district attorney's office deotape eight short sub- which Detective Walter R. had viewed previously concluded were possibly ie.

**T TO THEATRE**

is, in an affidavit, said he to the theatre with other ers of the DA's staff at 1:30 p.m. on Sept. 18.

investigator said he ized one of the films be- own as one of the eight viewed previously.

s said he and the other gators set up the video

was to begin, the film stopped and the theatre's lights came on. The investigator said another projectionist told him the film was broken and it would take him five minutes to fix it.

About 20 minutes later, Lonis said, a film appeared on the screen but it wasn't one of the eight he'd previously seen. That projectionist, later identified as Robert J. Sullivan, was taken before Judge Manerbino who told him he would have to show the films for videotaping.

Lonis said he and the other investigators returned to the theatre only to find the front doors locked.

**DROPPED SOMETHING**

The investigator said he went around to the back door and saw Stolar coming out. As Stolar saw him, Lonis said, Stolar dropped something on the floor.

Lonis said he then entered the theatre and saw eight rolls of film in plain white cartons. He said Stolar told him the theatre was closed because the equipment was broken down.

Lonis said he went to the projection booth with a deputy district attorney and found that the two projectors which had been showing the short subjects had been removed and another projector in a broken condition was sitting on the shelf in place of the other two projectors. He said the two projectors which he had observed showing movies in the theatre had been removed and there was no film in the projection booth whatsoever.

Stolar didn't testify at the contempt hearing.

# Move Against X Films Is Blocked by Court

DENVER—Judge John Brooks jr. of the Denver District Court acted on a motion by defense attorneys that threw an effective roadblock against further action against X-rated movies in Denver, at least until the district attorney can come up with a different and legal approach. The judge took the action as the result of a motion of four attorneys representing theatres showing X films. An injunction was issued prohibiting the district attorney's office from continuing its procedure against "adult" theatres, terming the action illegal.

### Appeal to State Court

It was indicated the district attorney would appeal the case at once to the Colorado Supreme Court. If this action does not produce the desired result it then is up to the district attorney to devise a different course of action.

In the campaign against X-rated films, which began in July, a detective would attend the theatre, view the film and, if it was thought to be "obscene," he would make such a report in an affidavit to the presiding judge, George Manerbino, who then would issue an order directing the Denver police to videotape the motion picture. After viewing the videotape the judge would decide whether he would hold an "adversary hearing."

After the filming, arguments would be heard and, if the judge decided that maybe the film was obscene, he would order the case into court, order the film seized and charges would be filed and a trial date set.

One result of the district attorney's ...tions has been that the head projectionist ... the Act I and II theatres was judged to ... in contempt of court and sentenced to se... days in the county jail. This was the re... of the disappearance of the film in questi... "Animal Lover." When officers went to ... theatre to impound the film, it was fou... that the program had been changed ... later two employees of the theatre were s... carrying several rolls of film away from ... showhouse.

### No Basis for Action

Judge Brooks declared there was no ba... for the actions taken by the county court ... in which an individual comes before ... court, gets an order to videotape and w... the order then being served on the offe... ing theatre. When Judge Manerbino was ... witness he declared the procedure w... "established" by the district attorney's o... fice.

Attorney Bernard Morley, represent... Studio E Theatre, said the method was ... "star chamber proceeding" and told t... court it should terminate the procedu... which violates the basic rights to wh... each of us is entitled.

Arthur M. Schwartz intervened in t... hearing as attorney for three theatres—t... Galaxy, Old Chelsea and Hayloft. The ... torneys produced witnesses that proved th... none of the proceedings had been docket... in the proper manner; therefore, they ha... no way of knowing whether they we... criminal or civil matters, among oth... things.

THE NEW YORK TIMES, SUNDAY, AUGUST 20, 1972

# Obscenity Issue

# Pending Before the U.S. Supreme Court Slows Drive on Smut in Times Square

ayor Lindsay's campaign
nst pornography in the
s Square area has been
ed for the time being by
bscenity case pending be-
the United States Supreme
rt.

two cases last week, films
the police had seized in
on Times Square theaters
to be returned to the the-
operators after their law-
convinced a Criminal Court
e that his authorization of
seizure was illegal. The
dealt with sodomy.

score of raids against peep
s in the Times Square area
d the shows down for two
, but legal proceedings
nst the operators were de-
l after the operators ob-
d injunctions barring the
from interfering with the
ations.

mour S. Detsky, counsel
) of the operators, sought
unction, charging that the
entered the peep-show
ses without warrants,
l films before examining
and without warrants and
t having an adversary
ding on their alleged ob-
y, and used pickaxes illeg-
to put the peep-show ma-
out of business.

greement with the city's
ration Counsel, the police
directed not to interfere
he enterprises, pending a
f the charges of obscen-
d the countercharges in
al Court next Tuesday.

deterioration of the area
en widely attributed to
roliferation of movie
showing films on sex
ion, peep shows offer-
n strips involving what the owners call "soft-core" pornography, unlicensed "massage parlors" and bookshops peddling books, pamphlets, photographs and devices on sexual themes.

Because of the protests of midtown businessmen, including many from the theater district who believe that the spread of pornography shops has hurt their industry, the Mayor ordered members of his administration to meet with representatives of the District Attorney's office last July 12 to plan a long-range campaign against pornography.

But the campaign met with increasing ineffectuality and, last Thursday, the police found themselves powerless to halt the showing of a film advertised as a portrayal of sodomy.

The film was "Deep Throat," presented at the World Theater, 153 West 49th Street, two doors east of a church, the Times Square chapel of the Salvation Army. At the request of the police public morals division, Criminal Court Judge Ernst Rosenberger viewed the film with Patrolman Michael Sullivan on Thursday night, then signed an order authorizing the police to seize the film when the theatre closed at 1 A.M. Friday.

A summons was served on the owner of the theater, Robert Sumner, and he was ordered to appear in court later in the day. Mr. Sumner's lawyers argued that Judge Rosenberger acted contrary to law in signing the authorization because he had failed to give the owner an adversary hearing first on whether the film was obscene.

Judge Rosenberger ordered
recess while he researched t
law. Returning to the bench
4 P.M., he said he had to agr
with the defense attorney, M
Detsky, and ordered the polic
to return the film. However, h
also directed that a subpoen
be served upon the lawyer
produce the film in court at
further hearing on Sept. 8.

The issue is one that is no
before the Supreme Court for
rehearing. The court has agre
to decide whether a judge w
has seen an allegedly obsce
movie may issue a search wa
rant to seize it from a theat
without first giving the theat
owner a hearing on wheth
the film is obscene.

At present, a film case mu
go through laborious appe
to the High Court, which m
take years, before the poli

can act to halt its presentatio
enabling, in a case where t
crime is proved, the operato
to profit from their condu
before the law may intervene

In the "Deep Throat" cas
the theater owner, Mr. Sumne
substituted a second print
the film and the house opene
on schedule at 10 A.M. Frida
with no halt in its activitie
The film was still being show
yesterday afternoon.

In a second case, howeve
involving a film titled "
Sticky Situation, seized
Thursday at the Hollywoo
Twin I Theater, Eighth Avenu
and 47th Street, the film w
not shown again after its r
turn on Friday. That case w
also heard by Judge Rosenber
er.

Deputy Inspector Joseph
Lynch of the public morals d

vision said his men would co
tinue to hand out summonse
when they found theaters an
peep shows presenting mat
rials held to be obscene.

The injunctions and the Ro
senberger ruling only preve
the police from seizing the m

Democrat and Chronicle Local

ROCHESTER, N. Y., SATURDAY, MARCH 18, 1972

# Police Give Movie a Low Rating




By TOM RYAN

Rochester vice detectives last night seized an X-rated film called "Adultery for Fun and Profit" at the Monroe Theatre, 585 Monroe Ave.

Detective Lawrence Catalfamo said about 50 patrons who were in the theater left after the raid.

John Antes Jr., 19, of 308 Benton St., who told detectives he is a trainee manager for Countrywide Theatres Inc, was charged with second-degree obscenity.

While the Monroe raid was being conducted, 15 to 20 members of Citizens for a Decent Community were picketing another Countrywide theater, the Riviera, at 1451 Lake Ave. Two X-rated films, "School Girl" and "The Undergraduate," were being shown there.

The film seizure at the Monroe resulted from a complaint from Citizens for a Decent Community, Detective Capt. James Lee said.

Yesterday afternoon, City Court Judge Carl R. Scacchetti, Assistant Dist. Atty. Howard R. Relin and vice detectives viewed the film. Arrest and search warrants were issued last night by Scacchetti and four detectives executed them shortly before 8 p.m.

While the film was being seized, about 20 persons, including several couples, waited in the lobby for the next showing.

They were told that the film was seized and that another film would be shown later. A theater employe said it also was an X-rated movie "but kind of a mild one."

While detectives were loading the seized film into their car, a man who apprently had been in the theater asked them, "Why don't you solve murders and crimes instead of butting into people's bedtime stories?"

Catalfamo told the man he and his men were on a special squad and the complainant drove off.

Antes was released in bail and will be arraign City Court today on the demeanor charge, carries a maximum pe of a $500 fine and a ye jail.

Linn Smeal, division ager for Countrywide The Inc., said early this mo that the attempt by "a ority to censor" was a tion of many persons' co tutional rights and "not this country is all about.

"There was no one a theatre who had their twisted to come into screen offering," he said.

Chronicle Local
ROCKETTER, N. Y., FRIDAY, JULY 7, 1972
Weather 23
Obituaries 23
SECTION B

Readers Ask HELP!

keRodeo

us Swim

wist 'Recharged'

nts Speeded

d Received

d Student

the D&C . . .

# Summer School: Harder to Enter



In The Class



D&C Photos by Lee Maxwell
Bystanders watch from playground as officer walks up to relieved truck.

## Emergency Calls

# Hot Line OK Seen by Fall

## Police Ordered To Return Film

## Democrats Pay 'Quig' A Tribute

## Tragedy Follows Frolic



Officer Joe Scalone puts sneaker and hat in bag.

# 'Jury' of Peers Studies Drug Death

## 'He took maybe 15 or 20 pills . . .'



Dean Eddaey at 'Superstar' rehearsal.

## sford 'Superstar'

## 'SESAME STREET'

## Film Prizes Go to Kid


The singers, dancers and soloists of
Up with People

Vienna Choir Boys

One of the treasures of the American Theatre
HAL HOLBROOK
MARK TWAIN TONIGHT

GONE WITH THE WIND
ADULTERY
"SCHOOL GIRL"

A CLOCKWORK ORANGE

rochester's finest theatre
LIFE IS A CABARET

DANCE
To The Music Of The
RHYTHM KINGS
FRIDAY & SATURDAY
C & M

The Comedy
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BOWLING by MOONLIGHT
$7.95
Olympic Bowl

REVIVAL CINEMA

Lakeshore

SHOWPLACE TWIN
"DESTROY ALL MONSTERS"

The U of R Concert Committee Presents
J.Geils
MARCH 18 at 9:00 P.M.
U of R Palestra

MARTINA THEATRES
PARAMOUNT
"A MASTERPIECE!"
Made For Each Other
Clint Eastwood
Dirty Harry
THE GO-BETWEEN
SUMMER OF WARING
NEIGHBORS

LAST 4 DAYS!
WALT DISNEY'S
Bambi
and the Thumper

LAST 4 DAYS!

GEORGE C. SC
"THE HOSPI

NOMINATED FOR 4 ACADEMY AWARDS
BEST ACTOR
WALTER MATTHAU


MARTHA THEATRES
CHUCK MANGIONE
QUARTET
PERFORMING FOR FLOOD RELIEF
NAZARETH ARTS CENTER
Players List Tryouts, Slate Rotary Play
Get on the Right Track...for old-time family fun!
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RIVIERA
Kitty's Pleasure Palace
MONROE
Sunday, August 6
7:30 P.M.
FAMOUS SCIENTIST
TO SPEAK ON
PARAPSYCHOLOGY and E.S.P.
Sheraton Inn
Rochester Airport
1100 Brooks Avenue
Rochester, New York
Double Duty Tonight For Singer
CAPITOL
HELD OVER! TWO ADULT HITS
SCHOOL GIRL
CORONET
Rochester Premiere
TIM HAS A PET RATTLESNAKE,
WHEN TIM GETS MAD-
STANLEY GETS DEADLY!
IN COLOR
STANLEY
PLUS
NIGHT OF THE LIVING DEAD
ROCHESTER
APPEARING WED.-SAT.
Continental
CHICK EDMOND
and his ORCHESTRA
APPEARING NIGHTLY
Cocktail Hour
"LONGFELLOW"
THE Towne-House

# Tanglewood Concert Honors Fromm

By [illegible]

LENOX, Mass., Aug. 25—The evening, [illegible] and-a-[illegible]-dance called may have enlivened or polluted many of those present, depending on their taste. It was the climax of the Festival of Contemporary Music at Tanglewood here last night. The air was [illegible] with agony and a concert, [illegible] the 25th anniversary of the Festival, honoring Paul Fromm, the Chicago [illegible] who has commissioned more [illegible] during the last quarter of a century than anyone else in the world.

The concert opened with a performance of Stravinsky's "Symphony of Psalms" (1930), which was conducted by the composer. It is a retrospective of sorts for Stravinsky, who has been [illegible] with the neo-classicism of his [illegible] period.

Then came the 1972 premiere of the [illegible] Lutoslawski's "Venetian Games," which was commissioned by the Fromm Foundation, [illegible] Harvard University. It is a work in the [illegible] manner of Charles Ives's "Three Places in New England" and Henry Cowell's "Symphony No. 4 (Adagio)," both of which were performed at the Festival in 1970.

Then came the world premiere of Elliott Carter's "Concerto for Harpsichord and Piano with Two Chamber Orchestras," in which [illegible] Gilbert and Gilbert Kalish took the solo keyboard roles.

Both the 1972 pieces [illegible] to be impressive efforts on the [illegible] composers of [illegible] art. Yet in today's [illegible] small [illegible] [illegible] "environment" employed 25 players divided into four separate [illegible] groups. The first [illegible] a [illegible] of small [illegible] [illegible] [illegible]

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Exclusive Limited Engagement

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"A magnificent visual experience and an assault on the senses. Each of the four leads is exceptional."

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THROAT

WORLD

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BUTTERFLIES ARE FREE

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See how WOODY ALLEN made a movie out of

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"INFLUENCIAL, TOUGH AND DANGEROUS"

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THE NEW CENTURIONS

Sticky Situation

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The story of the first Black President...

THE MAN

From the makers of "Bird with the Crystal Plumage"

whoever sees the flies-dies.

"Four Flies on Grey Velvet"

New York is a wonderland for children

# Criminal Court of the City of New York

Part 14-C, County of New York

STATE OF NEW YORK,
COUNTY OF New York } ss.:

Deputy Inspector Sheldon Smith, 6 1st. Division

of No. 1st. Division

being duly sworn, says that on July 31st, 1969 at about 5:30 P.M.

at 138 Bleecker Street (Garrick Theatre)

New York County, City and State of New York, the defendant(s) Paul Heller, Manager,

Steven Hardwick, Richard Palmer and Gladdney and Mark Rees, Projectionist

committed the offense(s) of:

.....CRIMINAL SODOMY (Sec. 130.38 Penal Law), in that said defendant engaged in deviate sexual intercourse with another person;

.....PUBLIC LEWDNESS (Sec. 245.00 Penal Law), in that said defendant, in a public place, intentionally exposed the private and intimate parts of his body in a lewd manner;

X OBSCENITY (Sec. 235.05 Penal Law), in that, knowing its contents and character, said defendant did promote, and possess with intent to promote, obscene material;

.....OBSCENITY (Sec. 235.05 Penal Law), in that, knowing its contents and character, said defendant did produce, promote and direct an obscene performance;

.....OBSCENITY (Sec. 235.05 Penal Law), in that, knowing its contents and character, said defendant did participate in a portion of an obscene performance which was obscene and which contributed to the obscenity of the performance;

in that Deponent states that the defendants did promote an obscene performance to wit: the showing of the movie "Blue Movie" and that said movie did depict a male and a female engaged in lewd and lascivious acts to wit: acts of sexual intercourse and other sexual contacts, for a profit;

Sworn to before me
July 31st, 1969, 19

Judge

Mark Smyth
Affiant

I hereby certify that the foregoing is a true
Copy of the Record on file in this Court
New York NOV 25 1969, 19
Court Clerk